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IN THE

Supreme Court of the United States

October Term, 1964

No. 995

KENNECOTT COPPER CORPORATION,
Appellant,

—v.—

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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March 1965

INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTE INVOLVED	4
STATEMENT:	
A. The Facts	4
1. The "Horizontal" Facts	5
a. Is "Paper Insulated Power Cable" a Line of Commerce?	7
b. May the Acquisition Substantially Lessen Competition in Paper Insulated Power Cables?	10
2. The "Vertical" Facts	16
3. The Injunctive Provisions	22
B. The Questions Presented are Substantial	24
CONCLUSION	26

TABLE OF AUTHORITIES

Brown Shoe Co. v. *United States*, 370 U.S. 294	2, 10, 11, 24
United States v. *Aluminum Co. of America*, 377 U.S. 271	15
United States v. *Bethlehem Steel Corp.*, Civil No. 115-328, S.D.N.Y.	23

	PAGE
United States v. *Brown Shoe Co.*, Civil No. 10527, W.D. Mo.	23
United States v. *Continental Can Co.*, 378 U.S. 441	9, 10
United States v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377	10
United States v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586	10
United States v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316	23
United States v. *Koppers Co.*, Civil No. Erie-792, W.D. Pa.	23
United States v. *Philadelphia Nat'l Bank*, 374 U.S. 321	10
United States v. *W. T. Grant Co.*, 345 U.S. 629	23

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OPINION BELOW

The opinion, findings of fact and conclusions of law of the district court (App., *infra*, 1a-26a) are reported at 231 F. Supp. 95.

JURISDICTION

This is a civil action under Section 15 of the Clayton Act, 38 Stat. 736, as amended, 15 U.S.C. § 25, to enjoin an alleged violation of Section 7 of said Act, 38 Stat. 731, as amended, 15 U.S.C. § 18. Final judgment, against the defendant (appellant Kennecott Copper Corporation), was dated and entered by the district court on November 24, 1964 (App. 27a-30a). On January 19, 1965, appellant filed a notice of appeal in the district court.

Section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. § 29, vests this Court with jurisdiction to review the judgment on direct appeal. *Brown Shoe Co. v. United States*, 370 U.S. 294.

QUESTIONS PRESENTED

In passing on the acquisition by appellant Kennecott Copper Corporation ("Kennecott") of The Okonite Company ("Okonite"), the district court found that "Okonite was interested in the merger for financial reasons. It felt it had to expand to survive and that Kennecott could supply the necessary capital" (App. 7a) and "the merger was primarily an advantage to Okonite rather than to Kennecott" (App. 23a).

The district court refused to find any violation of Section 7 with respect to insulated wire and cable, the line of commerce in which Okonite was engaged.

It did find a violation (i) with respect to "paper insulated power cable", an alleged submarket of insulated wire and cable, because both Okonite and a subsidiary of Kennecott manufactured paper insulated power cables, and (ii) with respect to the line of commerce of refined copper, in which Kennecott was engaged. The final judgment included an injunction against future acquisitions by Kennecott, and provided ancillary visitation rights to the government.

The ultimate question presented by this appeal is:

(1) Whether the district court erred in holding that the acquisition by Kennecott Copper Corporation of the assets of The Okonite Company violated Section 7 of the Clayton Act.

Subsidiary questions are whether the district court erred in holding

(a) that "paper insulated power cable" is a line of commerce within the meaning of Section 7;

(b) that the effect of the acquisition may be substantially to lessen competition in "paper insulated power cable"; and

(c) that the effect of the acquisition may be substantially to lessen competition in the line of commerce of refined copper.

A second question, which arises only if the first is answered in the negative, is

(2) Whether the district court erred in including in the final judgment an injunction against future acquisitions by Kennecott Copper Corporation, and in granting ancillary visitation rights.

A subsidiary question is:

(a) Whether the district court erred in enjoining future acquisitions by Kennecott, whether or not in violation of law, in areas unrelated to the competition found to have been affected by the acquisition by Kennecott, a producer of refined copper, of Okonite, a wire and cable fabricator, such as any acquisition by Kennecott of a company engaged in the production of refined copper, or engaged in business outside the United States.

STATUTE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. § 18, provides in relevant part:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

STATEMENT

A. The Facts

On November 24, 1958, Kennecott, a producer of refined copper, acquired the assets of Okonite (N.J.),* a fabricator of insulated wire and cable, a principal ingredient of which is refined copper. This raises what the district court described as the "vertical" aspect of the case.

Kennecott at that time had a subsidiary, Kennecott Wire & Cable Company ("KWC"), in Phillipsdale, Rhode Island, which was a very minor fabricator of in-

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* The assets of The Okonite Company (a New Jersey corporation) were acquired by The Okonite Company (a Delaware corporation), formed by Kennecott for that purpose. The business has since been conducted by the Delaware corporation. Where appropriate, these two entities will be distinguished by reference to "Okonite (N.J.)" or "Okonite (Del.)". After December 1958, Okonite (Del.) included the business of Kennecott Wire & Cable Company, referred to below.

sulated wire and cable, essentially of varieties different from those made by Okonite. In December 1958, KWC was merged into Okonite (Del.) as the KWC Division. This gives rise to what the district court described as the "horizontal" aspect of the case.

1. The "Horizontal" Facts

Both Okonite and KWC were manufacturers of insulated wire and cable, and the government charged that combining these enterprises under single ownership would violate Section 7 because of the likelihood of substantially lessened competition in the insulated wire and cable line of commerce.

In 1958, Okonite had 2.7% of domestic shipments of insulated wire and cable and KWC had 0.5%. The market share of each had been declining, and the combined operations continued to decline after the acquisition, from an aggregate of 3.2% in 1958 to 2.3% in 1962.

This decline followed naturally from the trend affecting both companies prior to the acquisition and their condition at that time. Okonite (N.J.), which had net profits after taxes of $2,363,000 in 1953, was reduced to $110,000 of profits in 1957 and a nominal $2,000 in 1958. KWC's market share had declined from 0.8% in 1954 to 0.5% in 1958.

Okonite, with a past history as a prestige company with fine products, found itself unable to make the transition from a wartime and post-war economy to a peacetime economy, where its competitors were installing more modern equipment and making more modern, lower cost products. As the district court indicated, Okonite had to

expand to survive. It also had to replace its largely obsolescent plant, and it had no money to do so.

KWC, on the other hand, did not have the management, engineering or sales personnel familiar with wire and cable fabrication who were capable of maintaining a position in the wire and cable industry.

KWC had a very old plant badly located in Rhode Island; the central point for industry sales was in the Midwest. KWC was not an important factor in the wire and cable industry.

Kennecott's acquisition of Okonite essentially brought together what was believed to be the competent personnel of Okonite and the possibility of Kennecott's supplying the financing so badly needed by Okonite. However, Kennecott's ownership of Okonite did not stem its downward trend. In the four years subsequent to the acquisition, Okonite (excluding the KWC Division) had net losses after taxes of approximately $5 million. It is doubtful whether Okonite (N.J.) would have survived as an independent company.

There was practically no competition between Okonite and KWC before the acquisition, and there was no evidence that any lessening of competition in the insulated wire and cable industry might result. Thus, while the district court noted in Conclusion of Law 2(a), as the parties stipulated, that insulated wire and cable is an appropriate line of commerce within which to measure the probable effects of the acquisition, there is no finding that the acquisition violated Section 7 because of any effect on competition in that line of commerce (App. 25a-26a).

a. Is "Paper Insulated Power Cable" a Line of Commerce?

Having found no violation of Section 7 in the stipulated insulated wire and cable line of commerce, the district court turned to a fragment of that market where the statistics give a distorted magnification of Okonite and KWC. This fragment is the court's paper insulated power cable "submarket." Thus, the first question is whether paper insulated power cables constitute a line of commerce within the meaning of Section 7.

In 1958, total shipments of insulated wire and cable, including telephone cables, magnet wire, power cable and many other varieties of insulated wire and cable, were $1,312 million. Paper insulated power cables are classified by the Census under "power wire and cable", which also includes power wire and cable insulated with different materials. Paper insulated power cables represented $39 million out of a total of $195 million of shipments of power wire and cable. Other power wire and cable products include portable power cables ($25 million), and power wire and cable insulated with varnished cambric ($10 million), rubber ($94 million), thermoplastic ($17 million), asbestos ($6 million) and "other" ($4 million).

There are four separate types of paper insulated power cables, each having different characteristics and uses.

(i) *Solid type,* which consists of a copper or aluminum conductor insulated with oil impregnated paper, covered with a lead sheath and, sometimes, with the lead sheath covered by a water-impervious protective covering; this type of construction is restricted in its upper voltage limit, and its range gen-

erally is from 1 kv (kilovolt) to 27 kv. This is the only type made by both Okonite (N.J.) and KWC.

(ii) *Gas filled type,* which has gas under pressure inside the lead sheath so that, if there is a break in the sheath, gas will flow out and water will not flow in. In some gas filled cables the lead sheath is reinforced to withstand the higher pressure by means of bronze tapes over a bedding of neoprene tapes and a neoprene tape jacket over-all. This type of cable is generally used at higher voltages than is the solid type. Okonite (N.J.) but not KWC made this type of cable.

(iii) *Oil filled type,* in which the cable is filled with oil under pressure. It is generally used at higher voltages than the solid type, or for technical reasons. This type was also made by Okonite (N.J.) but not by KWC.

(iv) *Pipe type,* where the cable, without a lead sheath, is enclosed in a pipe containing oil or gas under pressure. This type is used for high voltages up to 345 kv. It was made by Okonite (N.J.) but not by KWC.

There are separate specification books in general use for each of these four types, and the trade association collects separate statistics for "solid type" and "other types." KWC did not have the facilities for manufacturing any type except the solid type, of which its shipments were only $0.8 million in 1958.

Although solid type paper insulated power cables were once used extensively at 1 kv to 5 kv, other insulations have largely displaced paper at those voltages. At 15 kv

either rubber, plastic or paper insulation can be and is being used, the purchaser's decision being based largely on relative cost.

Utilities are the largest customers for power cable, and those using solid type paper insulated power cables generally put them in underground ducts. Paper is not water-impervious, and the utilities have been seeking substitutes which are water-impervious because of the seriousness of power failures resulting from a break in the lead sheath of solid type paper insulated cables.

The government's expert predicts that for this reason water-impervious polyethylene (plastic) insulated power cables, already in use at 15 kv and 27 kv, will soon become standard construction where paper is now being used at those voltages. 27 kv is the upper limit of the paper insulated power cables which KWC could produce, and at such voltages paper must compete with other insulations for all uses for which KWC sold such cables.

On the other hand, when a customer needs gas filled, oil filled or pipe type cables, it can not use the solid type paper cables which KWC produced. With the rapidly growing use of electricity, the market is continuously turning to power cable of increasingly higher voltages outside the useful limit for solid type paper insulated cables. Therefore, the three other types accounted for the majority of Okonite's (N.J.) sales of paper insulated power cables.

The district court thus found a so-called submarket in which the limited range of KWC products (i) was competitive with substitute products *excluded* from the district court's submarket (compare *United States* v. *Con-*

tinental Can Co., 378 U.S. 441; *Brown Shoe Co.* v. *United States, supra; United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377) and (ii) was not competitive with the gas filled, oil filled or pipe type cables *included* in the district court's submarket (compare *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321; *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586).

Paper insulated power cables are not a line of commerce within the meaning of Section 7. The government urged these products as a "submarket" because this is the only area of even insignificant overlap between Okonite (N.J.) and KWC.

However, the government apparently concedes that competition will be improved by keeping together in a single enterprise the former businesses of Okonite (N.J.) and of KWC, rather than making them separate enterprises again. The government has repeatedly urged that Kennecott divest, not the business of Okonite (N.J.) which Kennecott acquired, but Okonite (Del.), including the KWC Division, as a single entity.

The relief the government seeks because of the putting together of the wire and cable businesses of Okonite (N.J.) and KWC is that Kennecott be compelled to keep them together; thus, the government seems to agree that Okonite (N.J.) needed to expand to survive, and in effect seeks a compulsory merger of Okonite (N.J.) and KWC.

b. May the Acquisition Substantially Lessen Competition in Paper Insulated Power Cables?

The district court made its finding of illegality on the basis of just three facts:

1. The third largest seller (Okonite), with 19.6% of total sales, was combined with the eighth largest (KWC), with 2.1%.

2. The number of sellers was reduced by one.

3. The aggregate shares of the four largest companies, *i.e.*, General Cable, Phelps Dodge, Okonite (including KWC after 1958) and Anaconda, increased somewhat (but the reason was growth by Anaconda).

These three facts do not begin to tell the story, or take into account the various other factors necessary for determining the application of Section 7.* For that, we must start with a description of Okonite and KWC.

In 1958, Okonite had a reputation for quality products, able management and high engineering and research skills, but it was not able to keep up with the industry trend toward mass production of standardized types of wire and cable.

Okonite produced insulated wire and cable at three plants in New Jersey. Its Passaic plant was built in the 1880's and specialized in the production of rubber insulated power cables manufactured by the unique and costly process of wrapping strips of rubber lengthwise around the metal conductor and vulcanizing the seam. By 1958, Okonite was finding it increasingly difficult to

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* Compare this Court's admonition in *Brown Shoe Co.* v. *United States*, *supra*, that "Congress indicated plainly that a merger had to be functionally viewed, in the context of the particular industry" (370 U.S. at 321), and that "only an examination of the particular market—its structure, history and probable future—can provide an appropriate setting for determining the probable anticompetitive effects of the merger" (*Id.* at 322 n.38).

compete with the low cost products of competitors using newer and cheaper extrusion processes, and sales were declining substantially.

In 1958, Okonite's Paterson plant, built in 1925, was largely devoted to the manufacture of paper insulated power cables of all types, for voltages up to 230 kv.

Okonite and other companies (not KWC) had been conducting research on pipe type paper insulated power cables for 345 kv application, but at the time of the acquisition the Okonite facilities were not capable of commercial manufacture of such a large cable. In fact, it later appeared that Okonite was unable to manufacture certain large diameter cables, in voltages less than 345 kv, in current demand, and was removed by Consolidated Edison, the largest buyer in the country, from its approved list of suppliers for such products. Okonite's competitors had newer plants and equipment, and Okonite needed large sums of money to re-equip its plant for existing business as well as to enable it to manufacture the larger diameter and higher voltage 345 kv cable.

The Paterson plant also manufactured high quality, high cost, latex (rubber) insulated signal and control wire for defense use and for fire alarm systems. This profitable business was about to disappear on government approval of cheaper extruded polyethylene insulation as a substitute for latex.

Okonite's North Brunswick plant was purchased by Okonite in 1956. It was a large plant which had recently been built, but not used, as an assembly plant for Studebaker, and Okonite moved into it most of the equipment of its nineteenth century Wilkes-Barre plant and added some additional equipment.

Unlike the custom-built products of the Passaic and Paterson plants, North Brunswick was planned for the manufacture of standard types of insulated wire and cable by ordinary commercial methods. By 1958, it was apparent that the products of the North Brunswick plant required a type of manufacturing, selling and distribution new to Okonite, *i.e.*, long production runs and modern low cost production methods, warehousing and large inventories, as well as a different type of sales organization.

Because of the imminent loss of sales of strip insulated power cables and latex wire, its inability to produce higher voltage paper insulated power cables, with their larger diameters, and the need for much larger volume at North Brunswick, it was necessary for Okonite to expand and modernize in order to survive. Okonite's total 1958 earnings had declined to $2,000, and substantial losses were to follow in succeeding years. Okonite had already borrowed $7,000,000 to finance the purchase of the North Brunswick plant and the move to it. Okonite was not making a profit, and it had used up both its available cash and its borrowing capacity.

In 1958, KWC, located at Phillipsdale, Rhode Island, was a minor producer of insulated wire and cable with declining sales. Its principal products were telephone cables and magnet wire, which Okonite (N.J.) did not make. It also produced old-fashioned varieties of solid type paper insulated power cables for voltages up to 27 kv, but the market had gotten away from KWC and its sales of these products were only $0.8 million in 1958. Because of the illness of the president of KWC, the lack of competent management, sales, research and technical personnel, and

the fact that Rhode Island is not a geographically suitable location for a wire and cable operation since the principal market is in the Midwest, KWC was no longer a viable competitor, especially in paper insulated power cables.

There were already four insulated wire and cable producers making a full line of paper insulated power cables, *i.e.*, General Cable, Phelps Dodge, Okonite and Anaconda. These four, unlike KWC, had market acceptance and technical know-how, and had spent years in research on higher voltage cables, such as the very important 345 kv cable which recently reached the market. The government's evidence is that the volume of expected business at 345 kv is not sufficient to permit even four companies to operate profitably.

In 1958, there were also four producers of minor quantities and limited varieties of paper insulated power cables for lower voltages, Simplex, United States Steel, Colorado Fuel and Iron, and KWC. KWC was the smallest and least competitive of all and, after the acquisition, discontinued making these cables.

To become a serious contender in paper insulated power cables, KWC would have had to start building its plant from scratch at a new location. With the limited volume of available business, the increasing competition from other insulations, and KWC's lack of technical skill, there was no likelihood that KWC would undertake the expansion necessary to become a viable competitor in the manufacture and sale of paper insulated power cables. On the other hand, Okonite itself would not be a viable competitor today had it not been able to borrow $8 million from Kennecott in 1962 to re-equip completely its paper insulated power

cable facilities at the Paterson plant in order to remain competitive.

The district court's opinion and findings contain no discussion of competition in paper insulated power cables. There is no discussion of the probable future if Kennecott had not acquired Okonite. The court applied instead a *reauctio ad absurdum* to this Court's recent decision in *United States* v. *Aluminum Co. of America*, 377 U.S. 271, holding that a violation of Section 7 was proved because KWC's 2.1% was added to Okonite's 19.6%, based on this Court's finding of a violation when Rome's 1.3% was added to Alcoa's 27.8%.

But there is no basis for equating an obsolescent, unimportant and geographically mislocated KWC with progressive Rome, or equating a third-place, outdated Okonite, needing to expand in order to survive, with powerful first-place Alcoa.

The district court's two-page discussion of this important issue represents the application of a doctrine of *per se* illegality without reference to the evidence that combining Okonite (N.J.) and KWC had no potential for lessening competition. In fact, the subject of competition is not even discussed.

The unimportance of competition between Okonite (N.J.) and KWC before the Okonite acquisition was recognized by the government when it requested that the judgment require Kennecott to divest Okonite (Del.) as a single enti y, including the former KWC facilities at Phillipsdale, thereby perpetuating rather than seeking to undo the combination of these two companies.

2. The "Vertical" Facts

Copper is an international commodity freely traded in a world market. Free world production of copper has been increasing at a rapid rate, from 3,290,000 tons in 1954 to 5,300,000 tons in 1962, with new companies and new mines constantly increasing the available supply. The same trend has existed in the United States, where refined copper production increased from 1,418,000 tons in 1954 to 1,902,000 tons in 1962, with new companies and new mines furnishing most of the increase.

Kennecott's share of domestic shipments of refined copper declined from 33% in 1954 to 20% in 1962 (App. 14a fn.). No suggestion has been made in this case that the Okonite acquisition affected in any way Kennecott's position as a producer of refined copper.

The only question raised is the likely effect of Kennecott's acquisition of Okonite arising from the fact that it was a customer for refined copper. The district court found, as the evidence compelled, no effect on the availability of copper to users of that metal, and no effect on the ability of other copper producers to market their copper.

Okonite (N.J.) had purchased an average of 12,000 tons of refined copper per year, or about 0.3% of 1958 free world supply. This is the relevant statistic because refined copper is a fungible commodity which flows freely into and out of the United States, and Okonite (N.J.) had bought its copper largely from foreign sources. However, even confined to the domestic market, the average purchases of Okonite (N.J.) of 12,000 tons per year represented less than 1% of the demand side of the market (App. 14a fn.), while domestic production of refined

copper has been *increasing* at the rate of about 60,000 tons per year.

With this state of facts, it would seem clear that the acquisition of Okonite would have no adverse effect on competition in the line of commerce of refined copper.

How, then, did the district court conclude that the effect of the Okonite acquisition may be substantially to lessen competition in refined copper, particularly as the court found that Kennecott's percentage share of domestic shipments of refined copper had declined by about one-third between 1954 and 1962?

The district court made no finding of fact which could support the conclusion that the Okonite acquisition may adversely affect *competition* in refined copper. The district court avoided that question completely.

The court stated the problem it was considering as follows: "The problem is that a few big copper producers may buy up the available independent fabricators", and then discussed the possible effect of these hypothetical acquisitions on "the small copper producers' " ability to market their copper (App. 21a).

That question is completely different from the issue in this case—*i.e.*, the statutory question whether "the effect of such [the Okonite] acquisition may be substantially to lessen competition". Nor did the district court make any finding that the Okonite acquisition increased the likelihood that other copper producers would acquire other independent wire and cable fabricators; but without such a connection, the argumentation of the district court is completely unrelated to the Okonite acquisition.

The district court has, we believe unwittingly, in fact espoused a doctrine of *per se* illegality of vertical acquisitions. It is always possible to speculate that the acquisition of even a very minor customer would be followed by subsequent acquisitions by other companies of all of the other customers for that product, but if decision is permissible on such unsupported hypotheses, no vertical acquisition could survive.

The evidence is that (i) the Okonite acquisition did not increase the likelihood of further acquisitions, and (ii) there is no likelihood of further acquisitions by the leading copper producers.

1. Prior to the Okonite acquisition, Kennecott's leading copper competitors seemed to be internally expanding their wire and cable fabrication. At the same time, some of the independent fabricators, like Okonite, were viewing an uncertain future because of general industry overcapacity created during World War II and the Korean War and the slowdown of civilian postwar demand. Some of these independents, such as Okonite, for example, found themselves with obsolete or obsolescent plants and processes.

Kennecott was concerned by the possibility that independent fabricators—who in the aggregate accounted for 90% of Kennecott's sales of refined copper to the wire and cable industry—would lose position to Kennecott's integrated competitors, thus narrowing the available market for Kennecott's refined copper. This problem was sharpened when, shortly before the Okonite acquisition in 1958, it was learned that American Smelting & Refining Company ("Asarco"), a very large stockholder of Kennecott's largest wire and cable customer for refined

copper, General Cable Company, had embarked on a large venture for the production of copper in Peru.

At that time, Kennecott was engaged hardly at all in the use of copper in the fabrication of insulated wire and cable. General Cable's sales of insulated wire and cable were over fifteen times as large as those of KWC (Kennecott's wire and cable subsidiary); and the insulated wire and cable sales of Anaconda Wire & Cable Co. and Phelps Dodge Copper Products Corp. were each ten times those of KWC.

The competitive difficulties of Okonite (N.J.), described above, threatened its very existence. However, owned by Kennecott, Okonite (Del.) gives promise of being a viable competitor even though still very much smaller than General Cable, Anaconda or Phelps Dodge, and very much smaller than such independents as Western Electric, Essex, General Electric and General Motors.

The evidence was uncontradicted that Kennecott's ownership of Okonite since 1958 has not in any way affected the competitive position of the remaining independent fabricators and has had no effect on their ability or desire to remain independent. This was clear from the testimony of the government witnesses who were actually engaged in the wire and cable industry.

2. On the evidence, there is no basis for assuming that the Okonite acquisition would be followed by further acquisitions of wire and cable fabricators by major copper producers. General Cable (of which Asarco was a major stockholder), Anaconda and Phelps Dodge already had 7.9%, 5.8% and 5.0% of the insulated wire and cable market, and any acquisitions by Anaconda, Phelps Dodge

or Asarco would be subject to the application of Section 7 of the Clayton Act. There is, therefore, no reality in the district court's assumption that "a few big copper producers" could buy up the remaining independent fabricators.

3. By far the largest manufacturer of insulated wire and cable is Western Electric Company, a subsidiary of American Telephone & Telegraph Company. In 1958, the third largest was Essex Wire Corporation, a very large and profitable diversified company. The sixth largest was General Electric Company, and the seventh was General Motors Corporation. (Okonite was in eighth place.)

The vast resources of these enterprises, their very substantial positions as wire and cable fabricators, and the free availability of copper in the world market, do not permit serious speculation that they can be pushed out of the wire and cable industry, or that anyone would attempt to do so. It follows that there is no real likelihood that "a few big copper producers" may "buy up the available independent fabricators" with the result that there will be no independent customers for the small copper producers.

The alleged trend toward increased integration of copper production and fabrication that the district court assumes as a major factual premise (App. 7a) does not in fact exist. The refined copper shipped by Anaconda, Phelps Dodge and Kennecott—the three largest domestic copper producers—and consumed by their fabricating subsidiaries or divisions, including both wire mills and brass mills, represented a markedly declining percentage of total domestic shipments of refined copper before the acquisition of Okonite in 1958, and the declining trend continued after that acquisition. The percentages were 28% in 1955, 22%

in 1958, and 20% in 1961, even though shipments to Okonite are included for 1961 and not for the earlier years.*

4. The crucial finding of the district court is that small copper producers may some day find that they have no customers for copper. There is no evidence to support that finding, and that fear is shared neither by any of these copper producers nor, apparently, by the government.

Domestic copper producers, *other than* Kennecott, Phelps Dodge and Anaconda, have been constantly increasing their copper producing capacity in the obvious expectation of increasing sales. *New entrants* into domestic copper mining between 1953 and 1962 alone accounted for 246,000 tons of copper production in 1962.

The government, apparently concerned that the smaller copper producers may have too many customers, suggests that, upon divestiture of Okonite, the then independent Okonite be given a ten-year option to purchase copper from Kennecott, at its best price.

5. There is no evidence that the Okonite acquisition caused or worsened the plight of those few insulated wire and cable companies which were unable to make money because of industry overcapacity and intense competition. The progressive companies continued to make money.

6. The district court nowhere discusses *the effect of the Okonite acquisition* on competition in the refined copper

* The district court throughout discusses the case as though Anaconda, Phelps Dodge and Kennecott had jointly acquired Okonite, as a continuation of a common program of acquisition of independent wire and cable companies. The fact is that the latest acquisition by Anaconda was in 1929, and the only acquisition by Phelps Dodge was in 1930. Kennecott's only prior acquisition, of small KWC, was in 1935. There is no connection or interrelationship between Anaconda, Phelps Dodge and Kennecott.

industry. The court's rationale would apply equally if Kennecott had never acquired Okonite, and will be unaffected if Kennecott is required to divest Okonite.

The only difference would seem to be this: The court's unfounded fear that the independent wire and cable fabricator will cease to exist must also embrace the demise of an independent Okonite.* The district court does not, however, address the question: How would the small copper producer be advantaged by a demised independent Okonite?

There is no evidence that the acquisition of Okonite will lessen competition in refined copper. The district court based its decision on specious speculation which could be applied to any vertical acquisition and which, if adopted, would result in the application of a doctrine of *per se* illegality of vertical acquisitions contrary to the intent of the Congress and the decisions of this Court.

3. The Injunctive Provisions

Judge Dawson died shortly after filing his opinion, and the final judgment was framed by Chief Judge Ryan, without evidence of any necessity or desirability of an injunction against future acquisitions.

Nevertheless, the final judgment contains the following provision:

> "5. Defendant is hereby enjoined from acquiring the stock, assets or business of any company engaged in the production, fabrication or sale of refined copper or insulated wire and cable or paper

* This fear is unrelated to the Okonite acquisition (see App. 21a). The district court ignores the contribution to that fear arising from the vigorous competition of the aluminum companies which have historically been displacing copper with aluminum as the conductor metal for wire and cable.

> insulated power cable for a period of five years from the date of the accomplishment of the divestiture decreed by this Final Judgment, other than the purchases of the products of such companies in the normal course of business."

The judgment grants the government ancillary visitation rights for the same period of time.

This Court has declared that "Courts are not authorized in civil proceedings to punish antitrust violations, and relief must not be punitive." *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326.

Whether an injunction against future violations is warranted depends on whether there is a real danger of recurrent violations:

> "The purpose of an injunction is to prevent future violations. . . . But the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive."

United States v. *W. T. Grant Co.*, 345 U.S. 629, 633. This Court there upheld the trial court's refusal to grant injunctive relief on the ground that "The District Court was not dealing with a defendant who follows one adjudicated violation with others." *Id.* at 634. Thus, an injunction against future acquisitions was denied in *United States* v. *Bethlehem Steel Corp.*, Civil No. 115-328, S.D.N.Y., and in *United States* v. *Brown Shoe Co.*, Civil No. 10527, W.D. Mo., and was not even requested in *United States* v. *Koppers Co.*, Civil No. Erie-792, W.D. Pa.

A principal problem in this case is that the injunction would prohibit lawful as well as possibly unlawful conduct, and thereby inhibit Kennecott's freedom to compete in a lawful manner. Neither competition nor the economy is served by such restrictions.

Without any evidence of either need or desirability, Kennecott is enjoined from acquisitions outside the United States which would have no effect on our domestic or foreign commerce. The injunction, as it relates to the production of refined copper, could well inhibit Kennecott's perfectly legal efforts to make copper available for consumers. Such an injunction, against lawful acquisitions, may be felt not only by Kennecott but also by the consumers of copper, and may inhibit activities abroad which would be in our own national interest.

B. The Questions Presented are Substantial

The district court's decision on the horizontal aspect of the case presents the question whether, contrary to repeated statements by this Court, a doctrine of *per se* illegality should be applied in the enforcement of Section 7 of the Clayton Act, *i.e.*, the mere fact that the number of competitors is necessarily reduced in a horizontal combination and that the combined enterprise initially has the market shares of both companies.

The district court's decision also casts doubt on this Court's prior decisions by disregarding the fact that KWC was not a significant competitor, and that, without financial help from Kennecott after the acquisition, Okonite would not be competitive today in the sale of paper insulated power cables (compare *Brown Shoe Co.* v. *United States, supra* at 319, 321-22).

An equally important question is the district court's approach to the acquisition, limiting its inquiry to a small gerrymandered fragment of a market in which both companies may have participated, although without significant competition, and then finding the entire acquisition illegal without regard to the pro-competitive effects of the acquisition in the larger market.

This is the first case where the government has sought to have a horizontal combination of two fabricators held unlawful because of the possibility of an adverse effect on competition, and at the same time sought as relief an injunction requiring that they be kept combined and not separated.

The question whether the prior decisions of this Court should be avoided by a doctrine of *per se* illegality arises not only with respect to paper insulated power cables but also in the refined copper line of commerce. Okonite represented an insignificant part of the demand side of the market for refined copper, and there is no claim that *the effect of the Okonite acquisition* may be substantially to lessen competition in refined copper. This is the first time that an acquisition has been held illegal because of the effect of possible future acquisitions by other companies.

The fact, noted by the district court and then ignored, that "the merger was primarily an advantage to Okonite rather than to Kennecott" (App. 23a), and that Okonite "had to expand to survive" (App. 7a), present important considerations not present in the decisions of this Court upon which the district court relied.

This is the only Court authorized to review the judgment below.

CONCLUSION

For the foregoing reasons, we respectfully submit that substantial questions are raised by this appeal and that probable jurisdiction should be noted.

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March 1965

APPENDIX

Opinion, Findings of Fact and Conclusions of Law

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil No. 147-231

UNITED STATES OF AMERICA,

Plaintiff,

—against—

KENNECOTT COPPER CORPORATION,

Defendant.

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Opinion, Findings of Fact and Conclusions of Law

DAWSON, D. J.:

This case presents an issue as to whether the acquisition by a large copper producer of the assets of a substantial independent copper fabricator is a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, reading as follows:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Pretrial proceedings resulted in the entry on September 11, 1963 of Pretrial Order No. 1. This order established that on November 24, 1958, and at all times thereafter, defendant Kennecott Copper Corporation had been a corporation engaged in commerce and subject to the jurisdiction of the Federal Trade Commission; that prior to November 24, 1958, Okonite Company (New Jersey) was a corporation engaged in commerce and subject to the jurisdiction of the Federal Trade Commission; and that on November 24, 1958, Okonite Company (Delaware) was and still is a wholly-owned subsidiary of the defendant Kennecott Copper Corporation; that on November 24, 1958, Okonite Company (Delaware) acquired the assets of the Okonite Company (New Jersey).*

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* The Okonite Company (Delaware) was formed for the purpose of acquiring the assets of the Okonite Company (New Jersey).

The parties stipulated that the Court had jurisdiction to determine whether this transaction violated Section 7 of the Clayton Act. They also stipulated that the relevant section of the country, within the meaning of Section 7 of the Clayton Act, for purposes of the litigation, was the United States of America as a whole.

It was further stipulated that relevant lines of commerce for purposes of the litigation were (a) insulated wire and cable and (b) refined copper.

It was further stipulated that plaintiff contended and defendant denied that (i) paper insulated power cable is a submarket of insulated wire and cable and (ii) that copper wirebar is a submarket of refined copper; and that each such submarket is in and of itself a line of commerce within the meaning of Section 7 of the Clayton Act for purposes of the litigation.

The pretrial order provided that the issues remaining for trial were:

I. Is paper insulated power cable an appropriate line of commerce within which to measure the probable effects of Kennecott's acquisition of Okonite?

II. Is wirebar an appropriate line of commerce within which to measure the probable effects of Kennecott's acquisition of Okonite?

III. May the fact of Kennecott's acquisition of Okonite result in a substantial lessening of competition or a tendency to monopoly in any line of commerce?

Those issues were tried. The Court now renders its opinion, findings of fact and conclusions of law.

In order that we may properly consider the significance of the evidence on these three issues, it is necessary at the

outset to describe the position of Kennecott Copper Corporation and the Okonite Company in the copper industry. On November 24, 1958, Kennecott Copper Corporation acquired the assets and business of the Okonite Company. Kennecott was at the time the world's largest copper producer. It admitted in its answer that it is the largest domestic copper producer. Okonite was the country's second largest independent insulated wire and cable fabricator. Since its acquisition Okonite Company has operated as a wholly-owned subsidiary of Kennecott. About a month after the acquisition of Okonite, Kennecott transferred its subsidiary, Kennecott Wire and Cable Company (KWC), to Okonite.

The basic steps in the copper industry are mining, milling, smelting, refining and fabrication. There has been a tendency in the industry toward integration in the major companies of all these steps. Kennecott is completely integrated through smelting and largely integrated through refining. It owns five mining properties located respectively in New Mexico, Nevada, Arizona, Utah and Chile. It owns a refinery at the Utah location which refines the Utah production and a refinery in Maryland which handles most of the output of the other properties. The American Smelting & Refining Company is under contract to refine the remaining production. Integration through refining now appears to be a general rule in the industry in the large companies at least. Anaconda and Phelps Dodge had become integrated through refining at an earlier date than Kennecott.

Kennecott is also integrated to some extent through fabrication. Prior to its acquisition of Okonite, Kennecott

had two wholly-owned subsidiaries engaged in copper fabricating operations, Chase Brass & Copper Company, Inc. and Kennecott Wire and Cable Company. These two subsidiaries reflected the two basic industries which are customers of refined copper, i.e., wire mills and brass mills. In 1958, 59.2% of refined copper consumption in the United States was by wire mills and 38.3% by brass mills.

In the years preceding the merger Kennecott was in general satisfied with its position in the brass mill industry. Chase Brass & Copper Company had 12-13% of the industry and consumed almost 40% of Kennecott's shipments of copper to brass mills. It had a young and alert management and was well able to expand, not only to maintain the company's share of the market, but to improve the company's position.

Kennecott was not satisfied with its position in the wire and cable industry, however. Its subsidiary in that field accounted for less than 2% of wire and cable sales and consumed only about 10% of Kennecott's shipments to wire and cable companies. Kennecott felt that in order to maintain or increase its competitive position in the wire and cable industry it would have to expand. It also felt it had to expand its fabrication facilities in order to market its copper.

In a memorandum to Kennecott's Board of Directors, the executive vice president of Kennecott stated in 1958:

> " . . . In general, Kennecott's competitors in this hemisphere have been increasing their fabrication facilities through new plants and through acquisitions of fabricators. Some independent fabricators feel that they will in the future be squeezed

> by the integrated companies in their efforts to market their copper production.
>
> "It, therefore, appears essential if Kennecott is to be able to sell its mine production of copper that Kennecott acquire additional fabrication to replace fabricating accounts which it will lose or which will purchase only reduced quantities from Kennecott."

In early 1958 contact was established with the Okonite Company and merger negotiations began.

Okonite was the second largest of the independent insulated wire and cable companies at the time it was acquired. Only Essex Wire & Cable was larger in the independent field. General Cable Company was also larger, but it had a close relationship with American Smelting & Refining Company which owned roughly one-third of its common stock and therefore in the industry was not considered an independent.

Okonite's manufacturing operations were carried on in three plants located at Passaic, Paterson and North Brunswick, New Jersey. It also had a nationwide chain of sales offices located in the principal cities of the country and warehouses in Birmingham, Chicago, San Francisco and Syracuse.

The Okonite management was young and progressive and was reputed to be one of the most able in the industry. As an independent, Okonite relied on research, leadership in engineering and a reputation for quality to help market its products and to earn premium prices where possible. It claimed to be a leader in its field in terms of know-how and production ability. Its product line was quite broad compared with other independent wire and cable companies.

Refined copper was Okonite's principal raw material. Most of the refined copper was purchased in the form of wirebar or the products of wirebar. It had no rod mill. In 1954 and 1955 Kennecott was Okonite's principal copper supplier, but Okonite's purchases from Kennecott declined steadily from 1954 on. Okonite purchased 3,975 tons of copper from Kennecott in 1954; 2,959 tons in 1955; 1,961 tons in 1956 and 150 tons in 1957. There were no purchases in 1958 up to the time of the merger.

Kennecott's main purpose in expanding in fabrication was to assure a future market for the sale of its copper. In a memorandum sent by the executive vice president to Kennecott's board of directors in 1958, he wrote:

> "It is recommended that Kennecott acquire The Okonite Company, producers of insulated wire and cable, because the additional fabrication capacity will be essential to the future marketing of Kennecott's refined copper and will also provide a second profit on copper produced."

Okonite was interested in the merger for financial reasons. It felt it had to expand to survive and that Kennecott could supply the necessary capital.

We had, therefore, dynamic, economic forces which tended to promote integration in the industry. It was in response to those forces that this merger took place. This tendency existed in the entire copper industry. The other two big copper producers in the United States are Anaconda and Phelps Dodge. In 1922 Anaconda acquired the predecessor company of Anaconda Copper & Brass Company because it was convinced that in order to protect the

business of the company it should be placed in a position to control the outlets of its metals and to promote the sale and distribution of copper and brass products. Anaconda, in 1929, formed the Anaconda Wire & Cable Company by a series of acquisitions. Phelps Dodge acquired a copper product subsidiary as a result of acquisition in 1930. It was this tendency toward integration on the part of its two largest competitors that spurred Kennecott into the acquisition of Okonite. Mr. Milliken, the president of Okonite, testified (Tr. 2355-56):

> "Well, we thought we had a problem because, as I say, of this tendency on the part of our competitors in this country, Anaconda and Phelps Dodge, expanding their capacity, and also what seemed to be the attitude of the independents that they couldn't make money in copper fabrication. If those two things were carried to a, let's say, ultimate conclusion, then we would be in serious trouble."

We will now proceed to a consideration of the issues which were set for trial:

> I. *Is paper insulated power cable an appropriate line of commerce within which to measure the probable effects of Kennecott's acquisition of Okonite?*

Section 7 of the Clayton Act is designed to prevent any corporation from purchasing stocks or assets of another corporation when the effect of such acquisition would be substantially to lessen competition or tend to create a monopoly in any line of commerce in any section of the country. A determination of the effect of the acquisition

necessarily presupposes that there be a determination of the line of commerce involved. It was stipulated in the pretrial order that among the relevant lines of commerce for the purposes of this litigation were (a) insulated wire and cable and (b) refined copper. The Government, however, contends that *paper insulated* power cable is an appropriate sub-line of commerce.

Certain practical indicia may be examined to determine whether a submarket exists in a line of commerce. Those which were identified in *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962), at page 325, were as follows:

> "[I]ndustry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."

It has also been said by the Supreme Court that within a broad market "well defined submarkets may exist, which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 325 (1962).

The question presented on this point is whether or not paper insulated power cable is a sufficiently distinctive submarket of insulated wire and cable to constitute a line of commerce in and of itself. The common physical characteristic of all types of paper insulated power cable, which distinguishes it from other types of power cable, is that the insulation of paper insulated power cable is made of strips of high quality paper which are wound around the conductor and impregnated with a highly refined insulating oil

compound. The electrical conductor in paper insulated power cable is almost always made of copper. The use of copper results in a smaller diameter cable for a given voltage capacity. This is important because paper insulated power cable is normally used in underground ducts where space limitations can make the cross-sectional size of the cable important. To persons familiar with electrical cable, paper insulated power cable is easily distinguishable in appearance from other types of power cable.

The manufacture of paper insulated power cable is generally recognized in the industry as a separate segment of the insulated wire and cable business. A company's ability to manufacture paper insulated power cable is regarded as a mark of status by others in the industry. A certain amount of prestige is attached to a firm's ability to fabricate paper insulated power cable.

The National Electrical Manufacturers Association, the industry's trade association, devotes part of its statistical program to the collection and publication of separate data on paper insulated power cable. While it collects data for insulated wire and cable generally, paper insulated power cable is shown as a separate category. In 1958 and 1962-63, this trade association recommended to the Bureau of the Census that paper insulated power cable be classed as a separate product in the Census list, and in 1958 Kennecott and Okonite joined in that recommendation.

Paper insulated power cable is used to carry high voltages of electrical power. The great bulk of it is used to trunk power at high voltages underground for utility networks. In the main, paper insulated power cable has no

effective competition in the area of its major use from other types of insulated power cable.

The evidence was that, in manufacturing, specialized machines are used for the production of paper insulated power cable and that without specialized paper taping machines and oil impregnating equipment a fabricating company cannot manufacture paper insulated power cable. As a result, ordinary manufacturers of insulated wire and cable cannot make paper insulated power cable because, among other things, they lack the proper machinery and equipment.

In addition to specialized equipment, the manufacture of paper insulated power cable requires special engineering technical know-how. The manufacturing skills which are necessary to produce paper insulated power cable differ from those skills necessary to produce insulated wire and cable generally.

There are distinct customers for paper insulated power cable, largely the electric utility companies. Because utilities are the principal users of paper insulated power cable, the Association of Edison Illuminating Companies promulgates the standard specifications for paper insulated power cable, whereas specifications for other types of power cable are promulgated by the Insulated Power Cable Engineers Association.

There is an identifiable group of companies in the industry engaged in the manufacture of paper insulated power cable which is much more limited than the number which makes other types of cable. The only domestic manufacturers of paper insulated power cable are: Okonite, General Cable, Anaconda Wire & Cable, Phelps Dodge Copper Products, Simplex, American Steel & Wire Division of United States

Steel Corporation, John A. Roebling's Sons Division of Colorado Fuel & Iron Corporation, Reynolds Metals and Kennecott Wire and Cable. However, only the first four companies are manufacturers of full line paper insulated power cable. Each of the four principal paper cable manufacturers—Okonite, General Cable, Phelps Dodge and Anaconda—has issued a paper cable price book. Each company sells paper insulated power cable under identical instructions and under a complex pricing formula based on such factors as the price of copper, the price of lead and the price of insulation, and each company uses the identical pricing formula.

The above examination of the "practical indicia" referred to in *Brown Shoe* establishes that there is no reasonable interchangeability of use between paper insulated power cable and other insulated wire and cable. Paper insulated power cable is therefore a sufficiently distinctive submarket of insulated wire and cable to be considered a line of commerce in and of itself.

II. *Is wirebar an appropriate line of commerce within which to measure the probable effects of Kennecott's acquisition of Okonite?*

Wirebar is a particular shape in which refined copper is sold. It comes in various sizes. Basically the product is the same copper that is used in other shapes. The facilities used to refine the copper are identical no matter what shape is sold. To produce the various shapes, however, molds are required. Unique molds are used to cast wirebar, but there was no indication at the trial that sep-

arate mills were necessary nor that the molds involved any substantial investment. Copper refiners sell refined copper in various shapes but the vendors of wirebar are no more and no less specialized than the vendors of refined copper generally.

Wirebar is primarily used for the production of wire. The Bureau of Mines figures show that wire mills as a group consume over 92% of all wirebar.

The evidence was that sales contracts for refined copper commonly provide only for the sale of electrolytic or fire refined copper, and do not specify any particular shape. The particular shape desired by the customer is designated by the customer after the contract is executed, and it is immaterial to the copper refiner which shape or shapes it delivers.

Refined copper is sold by the pound. There may be some variation in prices due to extra charges for casting in unusual sizes or shapes, but this variation is minimal. The price behavior of wirebar is identical to the price behavior of refined copper generally.

Since it has been stipulated that an appropriate line of commerce for the determination of this action is refined copper, the particular shape in which the copper is sold becomes somewhat immaterial. Some purchasers may want the copper in the form of wirebar; other customers may wish it in other forms. The manufacturing skills which are necessary to produce wirebar are no different from those required to produce refined copper generally. The prices of wirebar are the prices of refined copper.

Kennecott, as a copper producer, shipped its copper in various forms, of which wirebar was an important sec-

tor. Its share of wirebar shipped in the domestic market was 23.7% in 1954, 20.9% in 1955, 21.2% in 1956, 19.9% in 1957, 20.9% in 1958, 16.9% in 1959, 18.3% in 1960, 22.1% in 1961 and 19.1% in 1962.

Okonite did not produce or sell wirebar. It was a purchaser of wirebar. It purchased copper in both the form of wirebar and rods. The receipts of wirebar and rod were 1.4% of total domestic shipments in 1954, 1.4% in 1955, 1.7% in 1956 and 1.6% in 1957.

In order to measure the probable effect of Kennecott's acquisition of Okonite, the Court may take into account the purchases by Okonite of refined copper from Kennecott and the percentage thereof which is sold in the form of wirebar. There is no significant difference in the positions of Kennecott and Okonite in the wirebar market from their positions in the refined copper market. Kennecott's shipments of wirebar are a slightly lower percentage of the industry total than are its shipments of refined copper, but Okonite's receipts are a slightly higher percentage.*

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* The parties have presented the Court with two alternate theories as to how to compute the total shipments of refined copper. Plaintiff contends that shipments are equal to consumption of refined copper as reported to the U.S. Bureau of Mines. Defendant contends that shipments are equal to production, less exports, plus imports, adjusted for annual inventory changes. Valid arguments have been presented upholding both sets of figures. Both methods appear to be equally accurate, and there is very little difference between the two sets of figures. Using the arithmetic average of the two sets of figures presented by the parties, Kennecott's share of the refined copper shipped in the domestic market has been 33.0% in 1954, 28.0% in 1955, 25.4% in 1956, 23.0% in 1957, 23.0% in 1958, 17.7% in 1959, 20.9% in 1960, 22.6% in 1961 and 20.2% in 1962. The receipts of refined copper by Okonite were .76% of total domestic shipments in 1954, .80% in 1955, 1.0% in 1956, and .96% in 1957.

Since there was no competition between Kennecott and Okonite in the sale of wirebar, and in view of the foregoing facts, it seems unnecessary to consider wirebar as a separate submarket for the purposes of this action. This is not to say that under particular circumstances the form in which a product is cast may not constitute a submarket in and of itself. However, in the present situation, the market obviously was one of refined copper. This has been stipulated as a line of commerce by the parties and represents the proper factual situation.

The Court holds that wirebar is not an appropriate line of commerce, as such, within which to measure the probable effect of Kennecott's acquisition of Okonite.

III. *May the effect of Kennecott's acquisition of Okonite result in a substantial lessening of competition or a tendency to monopoly in any line of commerce?*

This case involves the potential lessening of competition in the horizontal aspects of the industry and also in the vertical aspects of the industry.

(a) Horizontal Aspects of the Case

In this aspect of the case, paper insulated power cable is the line of commerce which is particularly significant. Before the merger there were nine companies which produced paper insulated power cable. Four of the nine controlled roughly 90% of the volume. The big four were: General Cable Corporation, Phelps Dodge Copper Products Corporation, The Okonite Company and Anaconda

Wire & Cable Company. In the year of the merger Kennecott was the eighth largest of the nine producers in this field in the net sales of paper insulated power cable. The respective positions of the companies are shown in Government Exhibit 405.

However, a significant fact which must be taken into account is that the four big companies in the field controlled roughly 90% of the market. The percentage controlled by the four was 86.3% in 1954, 88.5% in 1955, 88.5% in 1956, 89.5% in 1957, 90.1% in 1958, 92.9% in 1959 (when KWC and Okonite merged), 89.0% in 1960, 91.6% in 1961, and 92.5% in 1962.

We have, therefore, considering the net sales of this product to domestic purchasers in the year of the merger, a merger of the Okonite Company, the third largest, with Kennecott, the eighth largest. Okonite's percentage of net sales in this line of commerce in the year of the merger was 19.6%; Kennecott's percentage of the net sales in this line of commerce in the year of the merger was 2.1%.

The language used by the Court in *United States* v. *Aluminum Company of America*, —— U.S. —— (1964), is appropriate to this case:

> "In other words, the line of commerce showed highly concentrated markets, dominated by a few companies but served also by a small, though diminishing, group of independents.
>
> * * * * *
>
> "The acquisition of Rome added, it is said, only 1.3% to Alcoa's control of the aluminum conductor market. But in this setting that seems to us reason-

> ably likely to produce a substantial lessening of competition within the meaning of § 7. It is the basic premise of that law that competition will be most vital 'when there are many sellers, none of which has any significant market share' *United States* v. *Philadelphia National Bank*, 374 U.S., at 363."

Under the test laid down in *United States* v. *Aluminum Company of America, supra*, it would appear that in the horizontal aspects of this case Kennecott's acquisition of Okonite may result in a substantial lessening of competition in the paper insulated power cable line of commerce.

(b) Vertical Aspects of the Case

Essentially, as has been stated, this case involved the acquisition by a copper producer of a copper fabricator. It is a continuation of that tendency toward integration which has existed in the copper industry and which exists in many other industries. In the vertical aspects of the case we are not concerned with competition between the two merging companies but rather what the effect would be in the industry so far as its lines of commerce are concerned. We are here dealing with the question as to what Congress meant by "competition" in Section 7 of the Clayton Act. We must look to the history of the act and the interpretation of the act for guidance. Chief Justice Warren, in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), at page 344, stated:

> "... [W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices

> might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision."

Judge Learned Hand in 1945 made much the same point when he said:

> "Throughout the history of these statutes [the anti-trust laws] it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." *United States* v. *Aluminum Co. of America,* 148 F. 2d 416 (2d Cir.) at p. 429.

Thus we are concerned not alone with the probable effects of a merger upon a particular line of commerce but also its probable effects upon the economic way of life in the industry.

> "Moreover, as we have remarked above, not only must we consider the probable effects of a merger upon the economics of the particular markets affected but also we must consider its probable effects upon the economic way of life sought to be preserved by Congress." *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 333 (1962).

This Court has heretofore pointed out that:

> "The natural consequence of the profit motive in a competitive society is to lead businessmen to explore the possibilities for greater profits which might be derived from an amalgamation of competitive units,

> with an anticipated reduction of costs, and the establishment of a position of leadership and power in an industry which will be relatively unaffected by the competitive rivalry of smaller firms. Economists have recognized that the vigor of a competitive system exerts a centripetal force which tends, for reasons of self-interest of the parties involved, to bring about an amalgamation or union of the competitive units. Against this centripetal force the anti-trust laws have interposed a centrifugal force designed to keep the units separate and distinct and to halt the tendency toward amalgamation and union which otherwise might exist, and which, if allowed to run an unrestrained course, might result in a cartelized industrial organization which would be destructive to that individual enterprise which is regarded by most Americans as a touchstone of progress." *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387, at p. 396 (S.D.N.Y. 1957).

In fact, if our economic system of free enterprise is to survive, it is probably necessary for the Government to interpose itself in those situations where the natural force of economic rivalry tends toward undue concentration. Those who believe in Marxian economics, believe that the tendency toward monopoly is inevitable.* It is to withstand these economic pressures that Congress has enacted the antitrust

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* See, *"The Coming Struggle for Power,"* by John Strachey (New York, The Modern Library, 1935): ". . . No sooner has capital been accumulated to a considerable extent than the free and independent producers for the market . . . begin to 'get together.'" (At page 66). ". . . What, however, is indisputable is that the whole of American economic life is steadily coalescing and congealing into a vast conglomerate mass from which competition tends to be expelled. . . ." (At p. 74).

laws. The economic forces which lead to amalgamation and integration of large industries are very real forces. They may indeed be desirable forces. They often lead to economic and efficient operation. It is no answer to say that such processes are desirable from an economic standpoint, for Congress has said that the tendency is undesirable from a social standpoint, and we must enforce the law as Congress wrote it and as Congress intended that it be enforced.

Competition has been defined as "the process of exchanging goods or services in a market where there is a choice of rival bids and offers." *Kaplan, Big Enterprise in a Competitive System,* 42 (1954). To maintain a choice of rival bids and offers it is necessary to maintain the number of effective competitors in the market.

There is no one definition of competition. Economists do not agree over the meaning of the term nor do they agree how it can be achieved. However, in the legislative debate over the 1950 amendment to Section 7, great emphasis was placed on the undesirability of the political and sociological implications of mergers and of concentration and the desirability of the preservation of small business and dispersion of economic power. Although the meaning of "competition" was not discussed, the debate suggests reliance upon a structural theory of competition which stresses the advantages of a large number of small-sized businesses.

In the course of debate the evils of undue concentration in the copper industry were repeatedly cited as examples of what the amendment was intended to stop.*

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* E.g., 95 Cong. Rec. 11485 (1949) (remarks of Representative Celler); 95 Cong. Rec. 11489 (1949) (remarks of Representative Keating); 95 Cong. Rec. 11500 (1949) (remarks of Representa-

The problem is that a few big copper producers may buy up the available independent fabricators. Fabrication would then cease being a small business field and would be dominated by a few giant corporations which produce their own copper.* The remaining independent fabricators would fail because they could not compete against fabricators with assured sources of supply and large amounts of capital. The small copper producers would then have no place to market their product and would fail, increasing the concentration among producers as well. This has not happened yet, but Kennecott was worried enough about the continued existence of the independents that it felt that it had to capture one for itself.**

Kennecott's acquisition of Okonite has in fact operated to foreclose Okonite as a customer to other copper suppliers. Okonite's copper requirements, over and above that pur-

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tive Douglas); 95 Cong. Rec. 11502 (1949) (remarks of Representative Biemiller); 96 Cong. Rec. 16436 (1950) (remarks of Senator O'Connor). See also H.R. Rep. No. 1191, 81st Cong., 1st Sess. 2 (1949) (". . . no less than 70 percent of the long-term growth (1915-45) of the three largest companies [in the copper industry] Anaconda, Kennecott, and Phelps-Dodge, has been due to external expansion through acquisitions and mergers.")

* A similar situation in the steel drum industry was cited in debate on the floor of Congress as one case of undue concentration caused by merger activity. See 95 Cong. Rec. 11497 (1949) (remarks of Representative Boggs); 95 Cong. Rec. 11507 (1949) (remarks of Representative Byrne); 96 Cong. Rec. 16502-3 (1950) (remarks of Senator Kefauver).

** Paradoxically competition can also be lessened through the process of competition itself. The few big copper producers may be able to achieve the same result through internal expansion. This route is not forbidden by the Clayton Act, however. Presumably Congress felt that this route was inherently more justifiable. It is also more difficult to achieve and more difficult to prevent.

chased under Okonite's contractual arrangements existing at the time of the merger have been purchased from Kennecott since the merger, and it is expected that this will continue. Okonite is now obtaining virtually all of its copper requirements from Kennecott.

Okonite did not have a rod mill before the merger. It purchased its copper in the form of rod or in the form of wirebar which it had rolled into rod on a toll basis. Okonite was dissatisfied with this arrangement and was planning to build a rod mill. KWC on the other hand had a rod mill, but KWC's sale of rods to others had been limited to a few customers at low tonnages. As a result of the merger, Okonite dropped its plans for a rod mill and now the KWC mill rolls rods for the merged company.

In addition, the acquisition has added to the problems of Okonite's competitors. Since 1958, insulated wire and cable prices have been continuously falling due to overcapacity. This has been an industry-wide situation except for paper insulated power cable. Meanwhile the price of copper has remained relatively stable. Profit margins on insulated wire and cable have therefore dwindled so that many companies are now showing losses.

The integrated companies obtain the copper raw material at their cost of production, while the nonintegrated companies must pay the market price and then process the wirebar into wire and cable and sell it at a competing price with the integrated company. The integrated companies thus have an opportunity for profit in the production of the metal to justify their staying in a market in which there is a squeeze on fabrication, whereas the nonintegrated companies have no alternative opportunity for profit.

Thus the merger was primarily an advantage to Okonite rather than to Kennecott. Kennecott would have been better off in the short run selling to the independents and reaping the full profit in copper. But in the long run Kennecott feared that the independents might cease to exist. As a result of this fear Kennecott has made the problem even worse by removing an independent from the market and then competing with the remaining independents.

The Government contends that an additional evil exists on the Okonite level. The Government asserts that when copper has been in short supply, Kennecott has favored its own subsidiaries and that it will continue to do so. Evidence was received concerning the competitive situation existing during two periods of copper shortage, 1955-6 and 1959. The evidence does not support the Government's contention.

During periods of shortage Kennecott has sold its copper on an allocation system based on past purchases. Kennecott allocated copper to its own fabricating subsidiaries on the same basis as to its independent customers. It was in Kennecott's self-interest to do so. If Kennecott were to discriminate against its independent customers, it would severely damage its own business. Dissatisfied customers would not return when the period of shortage had passed.

In this case there is neither any claim nor any evidence that integration between copper production and fabrication results in cost savings. The advantages of the integrated companies in this case stem from economic power, not efficiency.

Integration through fabrication in the copper industry has already proceeded to an alarming degree. Copper pro-

duction is dominated by three companies, Kennecott, Anaconda, and Phelps Dodge, which together produced roughly 60% of the industry total during the period 1954-1958.* In 1958, the year of the merger, 25.3% of Kennecott's shipments of refined copper were to KWC and Chase. 76.8% of Phelps Dodge's shipments and 93.7% of Anaconda's shipments** were to their own fabricating facilities.*** The integration had proceeded so far that any significant increase among the big three by merger is highly suspect.

Before the acquisition of Okonite, Kennecott, Phelps Dodge and Anaconda were dominant in copper production, and Kennecott was the only one of these major producers which relied upon independent fabricators for a substantial part of its copper sales. Phelps Dodge and Anaconda were expanding their fabricating capacity. Kennecott feared that the independent fabricating companies would sell out to copper producers or switch into other kinds of business. Therefore Kennecott bought Okonite to preserve a market for its copper.

In short, the rationale of the acquisition was that there is no future in the copper industry for an independent in-

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* Figures are not available after 1958.

** Inspiration Consolidated Copper Co. sent 40% of its shipments to the subsidiaries of Anaconda. Anaconda has a 28.17% interest in Inspiration. If Inspiration and Anaconda are taken as a group, 82.3% of their shipments were to their own fabricating facilities.

*** Not all of the refined copper shipped was consumed by the subsidiaries, however. Some of the wirebar was rolled into rod and sold in that form to independent fabricators for further processing. In 1958, 36.1% of Phelps Dodge's shipments and 90.6% of Anaconda's shipments were ultimately consumed by their own fabricators.

sulated wire and cable fabricator, so the sooner the integrated companies become the dominant fabricators the better. The antitrust laws say otherwise, however. The fundamental purpose of Section 7 of the Clayton Act is to halt just such increasing concentration.

Kennecott's acquisition of Okonite seems likely substantially to lessen competition, or to tend to create a monopoly in both refined copper and paper insulated power cable in the United States.

Conclusions of Law

1. The Court has jurisdiction over the parties and jurisdiction to try the matter charged in the complaint.

2. The following are appropriate lines of commerce within which to measure the probable effect of Kennecott's acquisition of Okonite:

(a) Insulated wire and cable

(b) Paper Insulated power cable

(c) Refined copper.

3. As to each of the lines of commerce, the United States as a whole is the appropriate section of the country within which to assess the probable effect of Kennecott's acquisition of Okonite.

4. The effect of Kennecott's acquisition of Okonite may be substantially to lessen competition in the line of commerce of paper insulated power cable in the United States in violation of Section 7 of the Clayton Act.

5. The effect of Kennecott's acquisition of Okonite may be substantially to lessen competition in the line of commerce of refined copper in the United States in violation of Section 7 of the Clayton Act.

6. Kennecott's acquisition of Okonite constitutes a violation of Section 7 of the Clayton Act, as amended.

Submit decree, on notice, in accordance herewith, providing for divestiture.

Dated: New York, N. Y.
July 2, 1964

ARCHIE O. DAWSON
U.S.D.J.

Final Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 147-231

UNITED STATES OF AMERICA,
Plaintiff,

—v.—

KENNECOTT COPPER CORPORATION,
Defendant.

This cause having been heard and the Court having fully considered the evidence, arguments and briefs and being fully advised herein, and the Court having filed its Opinion, Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED AND DECREED THAT:

1. The acquisition by defendant Kennecott Copper Corporation through its subsidiary, The Okonite Company, the Delaware corporation, of the assets and business of The Okonite Company, the New Jersey corporation, as charged in the complaint herein, constitutes a violation of Section 7 of the Clayton Act, 15 U.S.C. §18.

2. Defendant Kennecott Copper Corporation is ordered to divest itself of the stock and business of The Okonite Company, the Delaware corporation, and to cause the divestiture of such business activities by sale or other means

or methods as the Court may hereafter determine and decree as just and equitable, so that the business of The Okonite Company and the parts and divisions thereof shall be reconstituted as an independent corporation capable of existence as a viable business.

3. Defendant Kennecott is ordered to submit to the Court within sixty days of this Final Judgment a proposed plan to carry this divestiture into effect and plaintiff shall have thirty days thereafter to file any opposition or to make any alternative or further proposals.

4. Pending Kennecott's divestiture of The Okonite Company, Kennecott shall administer the assets and business of The Okonite Company as a going business with a view to preserving and continuing it in as good condition as possible. Defendant shall also afford notice of any changes falling within the terms of PRETRIAL ORDER No. 3 in this case, filed December 23, 1959.

5. Defendant is hereby enjoined from acquiring the stock, assets or business of any company engaged in the production, fabrication or sale of refined copper or insulated wire and cable or paper insulated power cable for a period of five years from the date of the accomplishment of the divestiture decreed by this Final Judgment, other than the purchases of the products of such companies in the normal course of business.

6. Jurisdiction of this cause is retained by this Court for the purpose of enabling either party to this Final Judgment to apply to this Court at any time for such

further orders and directions as may be necessary or appropriate for the equitable modification, construction, carrying out or supplementation of this Final Judgment and for the enforcement of compliance therewith.

7. For a period of five years from the date of the accomplishment of the divestiture decreed by this Final Judgment and for the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, upon request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendant made to its principal office, be permitted, subject to any legally recognized privilege:

(A) Access during the office hours of defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession, custody or control of defendant as relate to any matters contained in this Final Judgment; and

(B) Subject to the reasonable convenience of defendant, but without restraint or interference from it, to interview officers, directors, agents or employees of defendant, who may have counsel present, regarding any such matters.

No information obtained by the means provided in this section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings in which the Department of Justice is a party, for the purpose of secur-

ing compliance with this Final Judgment, or as otherwise required by law.

8. Plaintiff's costs for the transcript of trial are taxed against the defendant.

Dated: New York, New York
November 24th, 1964

SYLVESTER J. RYAN
United States District Judge

Judgment Entered 11/24/64
JAMES E. VALECHE
Clerk

INDEX

	Page
Statement	1
1. The companies involved	2
Kennecott	2
Okonite	3
2. The acquisition	5
3. The effect of the merger upon competition	7
4. The judgment of the district court	10
Argument	11
I. *United States* v. *Aluminum Company of America*, 377 U.S. 271, establishes the illegality of Kennecott's acquisition of Okonite, a significant competitor in the concentrated market for paper-insulated wire and cable	12
II. Under *Brown Shoe Co.* v. *United States*, 370 U.S. 294, Section 7 of the Clayton Act prohibits Kennecott's acquisition of a major customer for refined copper (Okonite) as part of a significant trend toward vertical integration by copper producers	18
III. The district court correctly enjoined for five years further acquisitions in the markets adversely affected by the purchase of Okonite	23
Conclusion	26

CITATIONS

Cases:

Brown Shoe Co. v. *United States*, 370 U.S. 294 — 12, 15, 18, 19, 20

Federal Trade Commission v. *National Lead Co.*, 352 U.S. 419 — 25

Cases—Continued

	Page
International Salt Co. v. *United States*, 332 U.S. 392	25
United States v. *Aluminum Company of America*, 377 U.S. 271	8, 12, 13, 14
United States v. *National Lead Co.*, 332 U.S. 319	24, 25
United States v. *Penn-Olin Chemical Co.*, 378 U.S. 158	17
United States v. *Philadelphia National Bank*, 374 U.S. 321	12
Statute:	
Clayton Act, Section 7, 15 U.S.C. 18	1, 9, 10, 11, 12, 13, 18, 19, 24

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 995

KENNECOTT COPPER CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c), of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of the district court which adjudged that appellant, Kennecott Copper Corporation ("Kennecott"), the largest copper producer in the country, violated Section 7 of the Clayton Act, 15 U.S.C. 18, by acquiring in 1958 The Okonite Company ("Okonite"), the nation's second largest independent fabricator of insulated wire and cable. The judgment required Kennecott to dispose of its interest in Okonite and prohibited it from acquiring wire and cable companies or copper producers for five years.

1. THE COMPANIES INVOLVED

KENNECOTT

Kennecott is the world's largest copper producer (J.S. 4a). On the basis of current replacement value, its copper-producing assets alone are worth approximately $1.2 billion (Tr. 2332–2333). In 1958, Kennecott had sales of approximately $395 million; by 1962, its sales had increased to $514 million. At the end of 1962, Kennecott's capital and surplus were $757 million (GX 10).

The basic steps in the copper industry are mining, milling, smelting, refining, and fabrication (J.S. 4a). Kennecott operates four copper-producing properties in the western United States, as well as a copper mine in Chile; it owns copper refineries in Utah and Maryland (*ibid.*). Kennecott is completely integrated in the mining, milling, and smelting of copper and is largely integrated through the stage of refining (*ibid.*).[1] It is also partially integrated through the stage of fabrication. Prior to the acquisition of Okonite, Kennecott had two wholly-owned subsidiaries, Kennecott Wire and Cable Company ("KWC") and Chase Brass & Copper Company ("Chase"), operating in the two basic industries which consume refined copper: the copper wire and brass products industries (J.S. 5a).[2]

[1] The American Smelting & Refining Company is under contract to Kennecott to refine any balance of the latter's production not refined in Kennecott's own facilities (J.S. 4a).

[2] In 1958, wire mills consumed 59.2 percent, and brass mills consumed 38.3 percent, of all refined copper produced in the United States (J.S. 5a).

In 1958, these two subsidiaries received approximately 25 percent of Kennecott's total shipments of refined copper with the balance going to other fabricators (J.S. 24a). Kennecott was generally satisfied with the performance of its brass subsidiary, Chase, which had approximately 13 percent of the market for brass products and which consumed approximately 40 percent of Kennecott's shipments of copper to brass mills (J.S. 5a). Kennecott's management, however, was dissatisfied with the market position of its copper wire subsidiary, KWC, since it "accounted for less than 2 percent of wire and cable sales and consumed only about 10 percent of Kennecott's shipments to wire and cable companies" (*ibid.*). Since Kennecott's principal competitors had been increasing their fabrication capacity, through both the construction of new plants and the acquisition of independent fabricators, Kennecott was anxious to "acquire additional fabrication to replace fabricating accounts which it will lose or which will purchase only reduced quantities from Kennecott" (J.S. 5a–6a; GX 1, p. 2). Efforts were made to acquire the one-third interest in General Cable Company owned by American Smelting & Refining Company, but these proved unsuccessful (GX. 1, p. 4; J.S. 6a). Thereafter, negotiations were begun with the management of Okonite looking toward a merger between Kennecott and Okonite.

OKONITE

Founded as a family enterprise in 1878 and at the time of the merger still controlled by members of the founding families (GX 1, p. 4), Okonite was the sec-

ond largest independent company in the insulated wire and cable field at the time of its acquisition by Kennecott (J.S. 6a).[3] In 1957, Okonite's sales exceeded $40 million, and, as of August 31, 1958, it had assets in excess of $30 million; its capital and surplus account exceeded $16.9 million (Answer, para. 9). One of the most technically advanced of the wire and cable makers, Okonite's history from 1948 through 1956 showed annual total sales ranging from $28 million to $55 million (GX 5, J.S. 6a). The firm carried on its manufacturing operations in three New Jersey plants and had a nationwide system of sales offices and warehouses. It had "an excellent name, a skilled and experienced management team, and one of the best sales and distribution organizations in the industry" (GX 14, J.S. 6a). Okonite offered a line of insulated wire and cable quite broad by comparison with other independents (J.S. 6a). It relied heavily on research, leadership in engineering, and a reputation for qual-

[3] Only Essex Wire & Cable Corp. was a larger independent firm in the field. General Cable Company was also larger than Okonite, but due to its close relationship with American Smelting & Refining Company, a producer of refined copper, it was not considered an independent in the insulated wire and cable industry (J.S. 6a). Other companies, such as Western Electric, General Motors, and General Electric, fabricate insulated wire and cable, but most of their product is consumed internally in the manufacture of electrical equipment. Since their products are not generally sold on the open market in competition with such fabricators as Okonite, these companies are not considered independent fabricators of insulated wire and cable (Tr. 48–49, GX 470, GX 459, 460). Internal shipments in this "captive" market were excluded in the government's statistics accepted by the district court as to the size of this line of commerce, and the related shares of the merging companies (*ibid.*). Compare J.S. 19, 20.

ity products, in maintaining its position of leadership in the industry (J.S. 6a).

One of Okonite's principal products was paper-insulated power cable, a product widely accepted in the industry as a category of cable separate and distinct from any other kind of insulated power cable (J.S. 9a–12a). Okonite was the only independent among the four principal manufacturers of this product and enjoyed 19.6 percent of net sales in the year of the merger (J.S. 16a). The other three principal producers of this product were General Cable, closely related to American Smelting & Refining Company; the Anaconda Wire & Cable Company, a subsidiary of Anaconda; and Phelps Dodge Copper Products Corporation, a subsidiary of Phelps Dodge (J.S. 11a–12a; 15a–16a). These four companies controlled more than 90 percent of the paper-insulated power cable market (J.S. 16a). KWC also produced a limited line of paper-insulated power cable, with market shares ranging between 2.1 percent and 3.4 percent in the years immediately preceding the merger (GX 401). At the time of Kennecott's acquisition of Okonite, KWC's percentage of the net sales in this line of commerce was 2.1 percent (J.S. 16a).

2. THE ACQUISITION

The district court found that at the time of the acquisition of Okonite by Kennecott there were certain "economic forces which tended to promote integration in the industry" (J.S. 7a), that this "tendency existed in the entire copper industry" (*ibid.*), and that it "was in response to those forces that this

merger took place" (*ibid.*). Each of the nation's three largest copper producers had participated in the trend toward integration. Anaconda acquired the predecessor of its brass-fabricating subsidiary in 1922 due to its conviction that "it should be placed in a position to control the outlets of its metals and to promote the sale and distribution of copper and brass products" (J.S. 8a). It also formed its copper wire and cable subsidiary in 1929 by a series of acquisitions (*ibid.*). Similarly, Phelps Dodge entered copper fabrication by the acquisition of an independent fabricator in 1930 (*ibid.*) and Kennecott obtained both Chase and KWC by acquisition of independents in 1929 and 1935 (GX 17).

In recent years, expansion of copper firms into fabricating has occurred primarily on an internal basis rather than by acquisition. Such internal expansion by its two largest competitors spurred Kennecott to acquire Okonite (*ibid.*). Thus, as Kennecott's executive vice-president summed up the situation in 1958 in recommending that the board of directors consider the acquisition of Okonite (J.S. 5a–6a):

> * * * In general, Kennecott's competitors in this hemisphere have been increasing their fabrication facilities through new plants and through acquisitions of fabricators. Some independent fabricators feel that they will in the future be squeezed by the integrated companies in their efforts to market their copper production.
>
> It, therefore, appears essential if Kennecott is to be able to sell its mine production of copper that Kennecott acquire additional fab-

rication to replace fabricating accounts which it will lose or which will purchase only reduced quantities from Kennecott.

In enlarging its fabrication capacity, Kennecott chose external acquisition rather than internal expansion because "acquisition would eliminate severe competitive pressures that would otherwise develop" (GX 79, p. 15) and Kennecott "didn't want to duplicate any existing facilities" (Tr. 386).

Four months later, on November 24, 1958, Kennecott acquired the assets and business of Okonite for approximately $20 million. About one month after the acquisition, Kennecott made KWC, formerly its fabricator of insulated wire and cable, an operating division of Okonite. Following the merger, Kennecott dismantled KWC's equipment for manufacturing paper-insulated power cable and transferred all paper cable operations to the Okonite plants (Tr. 635–641, 647). Thus, Okonite is the only Kennecott division now engaged in the manufacture of this product.

3. THE EFFECT OF THE MERGER UPON COMPETITION

After extensive analysis of the facts, the district court determined the effects of Kennecott's acquisition of Okonite in two lines of commerce: (a) paper-insulated power cable, a submarket of a broader line embracing all insulated wire and cable and a submarket in which both Kennecott and Okonite competed; and (b) refined copper, a line of commerce stipulated by the parties prior to trial.[4]

[4] There is no dispute that the entire United States is the proper section of the country with respect to each of these lines.

(a) The district court held (J.S. 8a–12a) that paper-insulated power cable was an appropriate product market due to such "practical indicia" (J.S. 9a) as its unique physical characteristics and peculiar end uses, industry recognition that paper-insulated power cable is "a separate segment of the insulated wire and cable business" (J.S. 10a), the specialized equipment and vendors necessary for the production and sale of the product, and the special skills of "an identifiable group of companies in the industry engaged in the manufacture of paper insulated power cable * * *" (J.S. 11a).

It found (J.S. 23a–24a) that the market for paper-insulated power cable was highly concentrated; four companies (Anaconda, Phelps Dodge, Kennecott, and General Cable) controlled in excess of 90 percent of the total net sales after Kennecott's acquisition of Okonite (J.S. 16a).[5] The merger of the two companies joined Okonite's 19.6-percent share of the market, third largest prior to the merger, with Kennecott's share, which ranged from 2.1 percent to 3.4 percent in the years preceding the merger (J.S. 16a; GX 401).[6] Relying on these facts and on this Court's decision in *United States* v. *Aluminum Company of America*, 377 U.S. 271, the district court held that the acquisition of the second largest independent fabricator in this line of commerce by one of its competitors,

[5] The percentage share of the market of the four leading companies was a rising one, starting with 86.3 percent in 1954 and increasing to 92.9 percent after the acquisition by Kennecott of Okonite (J.S. 16a).

[6] In the year of the merger, Kennecott's share of the market was 2.1 percent (J.S. 16a).

which was the nation's largest copper producer and also a substanttial fabricator of paper-insulated wire and cable, violated Section 7 of the Clayton Act (J.S. 16a–17a).

(b) With respect to the effects of the acquisition in the market for refined copper (which was stipulated to be a separate line of commerce), the district court based its conclusion of illegality on the actual and potential foreclosure of small independent copper producers resulting from the elimination of Okonite as a customer for refined copper, and on the marked increase in integration which threatened to eliminate other independent fabricators from the market (J.S. 21a). Thus, Okonite, which had been consuming approximately 11,000 tons of refined copper annually (or at the current market price at the time of the trial of $0.31 per pound, almost $7,000,000 worth per annum (GX 491, 494)), was eliminated as a customer of the independent producers. And independent fabricators were threatened with extinction through the competition of their own suppliers, including the big-three copper producers who shipped approximately 65 percent of their total production to their own fabricating subsidiaries (J.S. 24a). The extent and nature of this long-range threat to competition was described by the district court as follows (J.S. 21a):

> The problem is that a few big copper producers may buy up the available independent fabricators. Fabrication would then cease being a small business field and would be dominated by a few giant corporations which produce their own copper. The remaining

> independent fabricators would fail because they could not compete against fabricators with assured sources of supply and large amounts of capital. The small copper producers would then have no place to market their product and would fail, increasing the concentration among producers as well. This has not happened yet, but Kennecott was worried enough about the continued existence of the independents that it felt that it had to capture one for itself.

The district court held that integration through the stage of fabrication by the big producers had proceeded so far even before Kennecott acquired Okonite that "any significant increase among the big three by merger is highly suspect" (J.S. 24a). It concluded that the merger had a not-insignificant effect on the refined copper line of commerce; that it substantially increased the already "alarming degree" (J.S. 23a) of integration in the industry; and that Kennecott's asserted justification for the merger—that independent wire and cable fabricators had "no future" in the copper industry—was contrary to the clear purpose of Section 7, which was to halt the very type of increasing concentration shown by the record in this case (J.S. 24a–25a).

4. THE JUDGMENT OF THE DISTRICT COURT

Shortly after rendering his opinion, findings of fact, and conclusions of law, District Judge Dawson died and, by stipulation of the parties, the case was assigned to Chief Judge Ryan for all purposes, including the settling of the decree. After a hearing, Chief

Judge Ryan entered a final judgment requiring the appellant to dispose of Okonite "so that the business of The Okonite Company and the parts and divisions thereof shall be reconstituted as an independent corporation capable of existence as a viable business" (J.S. 28a). The final judgment also prohibits the appellant for a period of five years from the date of divestiture "from acquiring the stock, assets or business of any company engaged in the production, fabrication or sale of refined copper or insulated wire and cable or paper insulated power cable * * *" (*ibid.*).

ARGUMENT

This case involves the validity under Section 7 of the Clayton Act of the acquisition by the largest copper producer in the country (and, indeed, in the world) of the nation's largest independent fabricator of paper insulated wire and cable, a line of commerce representing as much as $64 million in annual net sales in recent years (GX 471). Noting that the copper industry is highly concentrated in production and refining of the metal and that integration of primary producers through the fabrication stage "has already proceeded to an alarming degree" (J.S. 23a), the district court stated (J.S. 24a) that "any significant increase [in such integration] among the big three by merger is highly suspect." It held that Kennecott's acquisition of Okonite violated Section 7 because of its effect in two lines of commerce—the horizontal impact in the manufacture and sale of paper-insulated power wire and cable (the market in which both companies competed prior to the merger),

and the vertical impact in the production and sale of refined copper, a basic ingredient of power cable.

The legal issues that appellant raises involve such questions as the proper criteria for delineating the relevant product market under Section 7 and the appropriate standards for appraising the horizontal and vertical effects of a merger to determine whether it may tend substantially to lessen competition in any line of commerce. The government has frequently brought such issues before the Court and does not question their general suitability for its determination. In the present case, however, the issues presented are so far within *United States* v. *Aluminum Company of America*, 377 U.S. 271 and *Brown Shoe Co.* v. *United States*, 370 U.S. 294,[7] as to leave no substantial question for full-dress argument. Accordingly, the judgment below should be affirmed.

I. *UNITED STATES v. ALUMINUM COMPANY OF AMERICA*, 377 U.S. 271, ESTABLISHES THE ILLEGALITY OF KENNECOTT'S ACQUISITION OF OKONITE, A SIGNIFICANT COMPETITOR IN THE CONCENTRATED MARKET FOR PAPER-INSULATED WIRE AND CABLE

A. The district court held that the merger violated Section 7 of the Clayton Act because of its horizontal effects in the market for paper-insulated cable. This result was dictated by the decision in the *Alcoa* case, where this Court held that (377 U.S. at 278–279) in "highly concentrated markets, dominated by a few companies but served also by a small, though diminishing,

[7] See also *United States* v. *Philadelphia National Bank*, 374 U.S. 321.

group of independents," the acquisition of one of the few significant remaining independents by one of the leading integrated companies violates Section 7.

The crucial facts in the instant case are strikingly similar to those previously before this Court. Here, as in *Alcoa*, the market was "dominated by a few companies but served also by a small, though diminishing, group of independents" (J.S. 16a). In *Alcoa*, five companies controlled about 65 percent of the market; in the present case, four companies controlled in excess of 90 percent of the market and, as in *Alcoa*, a substantial independent competitor was eliminated by the merger. Similarly, while not decisive, the market shares of the merging companies in the present case were quite similar to those in *Alcoa*. Indeed, here it was the independent fabricator (Okonite) which had the larger share of the market before the merger (19.6 percent as contrasted with Kennecott's 2.1 percent), while in *Alcoa* the integrated producer had the larger share. In both cases the result of the merger was to increase substantially the degree of concentration in an already highly concentrated industry by the elimination of an important independent competitor. *Alcoa* teaches that this effect is enough to show that the merger is likely substantially to lessen competition.

Although we believe this analysis of the structure of the market and the roles of the merging competitors was in itself enough, under *Alcoa*, to sustain the decision below, there was more before the district court. It noted that the vigor of competition had already diminished because of the small number of competitors, stating (J.S. 12a):

> Each of the four principal paper cable manufacturers—Okonite, General Cable, Phelps Dodge and Anaconda—has issued a paper cable price book. Each company sells paper insulated power cable under identical instructions and under a complex pricing formula based on such factors as the price of copper, the price of lead and the price of insulation, and each company uses the identical pricing formula.

The elimination of KWC as a substantial competitor in this concentrated industry would reduce whatever opportunity remains for price and other forms of competition.

B. Appellant's major challenges to the controlling force of *Alcoa* are its contentions: (1) that KWC was not a significant competitive entity before the merger and that Okonite would not have survived as a competitor in the absence of the merger (J.S. 13–15, 24); and (2) that paper-insulated wire and cable is not a separate product market (J.S. 7–10). Neither of these contentions has merit.

1. The record simply does not support appellant's assertion that the merger was an economic necessity because both its own fabricating facility, KWC, and Okonite were actually or imminently in a failing condition. As indicated in the Statement, *supra,* Okonite was a very substantial firm; this was shown by such objective factors as management, assets, sales, technical know-how, and product line.[8] There is no indica-

[8] There is little in the record that supports the intimation (J.S. 6) that Okonite had exhausted its borrowing capacity and could not expand on its own. Actually, as the trial court specifically found (J.S. 22a), Okonite was planning a substantial

tion that Okonite would not have maintained or improved its reputation as "a leader in their field in know-how and production ability" (GX 13) and as "the largest independent full-line cable manufacturing concern that was pre-eminent in the public utility field" (Tr. 386). With respect to KWC, the record establishes that it was a viable, active competitor in its field, with paper cable products as acceptable to the trade as those of its rivals (Tr. 906–907). KWC had been a profitable operation over the years and there was no expectation that this condition would not continue with the backing of the world's largest copper company (see GX 1, p. 3).

2. The record fully and convincingly supports the district court's conclusion that paper-insulated power cable constitutes a separate and distinct submarket in which the horizontal effects of the acquisition should be assessed. In reaching this conclusion, the court carefully evaluated and discussed at length (J.S. 8a–12a) the "practical indicia" of a separate submarket noted in *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 325, and found that each indicated that paper-insulated cable was such a market.

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internal expansion, through the construction of its own rod mill. This development was blocked by the merger. It is true, as appellant points out (J.S. 5), that Okonite's net profits fell to "a nominal $2,000 in 1958," the year of the merger, but the record clearly establishes that this decline was directly related to substantial, non-recurring costs incurred in moving a large paper cable manufacturing facility from Wilkes-Barre, Pennsylvania, to a more modern facility in New Jersey (GX 5, p. 8; GX 1A, p. 2; GX 2). Immediately prior to the merger Okonite itself regarded its future prospects as "bright" (GX 5, p. 7).

Thus, "[i]n the main, paper insulated power cable has no effective competition in the area of its major use from other types of insulated power cable" (J.S. 10a–11a). This unique and economically significant capacity for use as a conductor in underground ducts (J.S. 10a) may, in itself, be determinative of a separate market, but there is much more to support the court's conclusion. Specialized machinery is required to manufacture this product; special technical knowledge is equally necessary (J.S. 11a). There is a distinct group of customers who purchase paper-insulated cable; separate specifications are published for it (*ibid.*). An identifiable group of companies in the industry engage in the production of paper-insulated power cable, and their prices tend to be identical (J.S. 12a). Finally, the manufacture of paper cable is generally recognized in the industry as a separate segment of the insulated wire and cable market (J.S. 9a–10a);[9] it is so recognized by the industry's own trade association, as well as by the Bureau of the Census which lists and classifies paper-insulated power cable as a separate product (*ibid.*)

Appellant contends that this market is at once too narrow because it excludes some competitive cable insulated with plastic and other non-paper insulations and too broad because it includes all forms of paper-insulated power cable although KWC, unlike Okonite, did not produce a "full line" of such cable. The short answer to both contentions is that defining a

[9] Indeed, Kennecott itself recognized that the product duplication between it and Okonite lay in the field of paper-insulated power cable (see GX 1, p. 7).

product market is necessarily a practical effort, and no product market will ever be theoretically perfect as an instrument of measuring the competition affected by an acquisition. Because approximation is a necessity, reasonableness and not perfection has always been the standard. It is clear in this case that the market chosen not only provides a reasonable and fair measure of the effects of the acquisition but also provides the best possible measure within the limits of practicality.

Surely no more was required for the exclusion from the submarket of cables insulated with plastic and other materials than the district court's thoroughly supported (see, *e.g.*, Tr. 351) finding that "paper insulated cable has no effective competition in the area of its major use from other types of insulated power cable" (J.S. 10a–11a). Similarly, its decision to include all forms of paper-insulated power cable rather than tailoring the market to the measure of KWC's product line is supported not only by the administrative difficulty (if not impossibility) of inventing, defining, and measuring novel subcategories of a recognized market but also by the fact that KWC, at the very least, represented a significant threat of potential competition throughout the whole line of paper-insulated power cable. It was, after all, expert in the technology, familiar with the customers, ambitious, and backed by the immense financial resources of Kennecott. Cf. *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158.[10]

[10] Although these facts alone plainly support the inclusion in a single submarket of all forms of paper-insulated power

C. Finally, appellant contends that the government has recognized the desirability of a combination of Kennecott and Okonite in the manufacture of paper-insulated cable and wire, for it has suggested that Kennecott should divest all of Okonite, including the division of Okonite which was formerly Kennecott's subsidiary, KWC. But KWC no longer produces paper cable; following the merger Kennecott removed all paper cable machinery from the KWC plant, which is now used exclusively in the manufacture of other products (Tr. 635–641; 647). The government's suggestion thus reflected only the unfortunate difficulties of unscrambling assets which have been illegally combined and not any approval of a continuing combination of the paper-cable producing facilities of Okonite and Kennecott. Indeed, the basic change in the character of KWC's operations since the merger means that if Kennecott now wishes to reenter the paper-cable field, it will have to do so through its own internal expansion.

II. UNDER *BROWN SHOE CO. v. UNITED STATES*, 370 U.S. 294, SECTION 7 OF THE CLAYTON ACT PROHIBITS KENNECOTT'S ACQUISITION OF A MAJOR CUSTOMER FOR

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cable, we also note that (by Kennecott's own figures) about 55 percent of Okonite's dollar sales in 1958 were attributable to solid paper-insulated power cable (DX 103) and that, in the entire industry, approximately 70 percent of the total footage of cable sold and shipped is in the range below 25 kv., well within the range in which KWC held itself out as a competitor prior to the merger (GX 148, Tr. 393–394, 791–794). Finally, prior to this acquisition the Kennecott management had no doubt that paper-insulated cable represented an "important competitive item" in the competition between Kennecott and Okonite (GX 1, p. 7; see, also, GX 410, 471, 477).

REFINED COPPER (OKONITE) AS A PART OF A SIGNIFICANT TREND TOWARD VERTICAL INTEGRATION BY COPPER PRODUCERS

In *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 328–334, this Court discussed the principal factors to be considered in assessing the vertical effects of a merger: the share of the market foreclosed; the purpose of the merger; the trend toward vertical integration in the industry; and the effect of the merger upon the Congressional policy of preserving local control of relatively small and independent businesses. The district court in the present case carefully considered and correctly applied each of these factors in determining that Kennecott's acquisition of Okonite, a purchaser of refined copper, would probably substantially lessen competition in the refined copper line of commerce. It relied particularly upon (a) the purposeful pre-emption of Okonite as a substantial customer of that product and (b) the "alarming" degree of integration through the stage of fabrication in the copper industry which threatened to drive independent fabricators out of the market, thereby depriving small copper producers of a market for their product (J.S. 21a–22a).

A. Appellant's principal contention with respect to the pre-emption of Okonite appears to be that the latter's consumption of refined copper is *de minimis* (J.S. 16–19, 25), and therefore the loss to competition is beyond the reach of Section 7. The facts are, however, that in 1958 Okonite consumed some 10,945 tons, or 0.9 percent of total national consumption (GX 235). Based on the market price of $0.31 per pound at

the time of trial, Okonite represented a market for refined copper in excess of $6,785,000 (GX 491, 494). And Kennecott estimated that an expanded Okonite operation would consume as much as 54,000 tons of refined copper annually (GX 1, pp. 1, 6). Okonite thus plainly represented a substantial segment of the market; indeed, it appears to have been the largest independent cable producer that Kennecott could acquire (see *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 331–332).[11]

The importance of the market represented by Okonite's copper purchases is well described in the internal Kennecott memorandum on the basis of which the acquisition was undertaken. The company's executive vice-president stated that "Kennecott's refined copper sales were in jeopardy" because of the anticipated over-supply of copper production, and the increasing integration of copper producers into fabrication, resulting in a "squeeze" on independent fabricators (GX 1, pp. 1–2; see testimony of the same official, Tr. 2283–2284, 2361). Because it appeared "essential if Kennecott is to be able to sell its mine production of copper that Kennecott acquire additional fabrication" (GX 1, p. 2), the acquisition of Okonite was recommended. If thus foreclosing Okonite's portion of the market as an outlet were as important to a vast producer like Kennecott as its internal memorandum indicated, it would be many times

[11] The only independent larger than Okonite was Essex Wire & Cable Corp. Kennecott considered acquiring Essex but determined that the company "did not meet our requirements" (GX 1, p. 4). In addition, Kennecott sought—but was unable—to acquire the interest in General Cable Corp. held by American Smelting & Refining Co. (*ibid.*).

more important to the smaller independent refiners and the competition which they provide.

B. The district court properly recognized that the impact of the present acquisition could not be divorced from the industry's trend toward integration into fabricating—a trend which caused Kennecott's acquisition of Okonite and in which this acquisition was a further substantial step. After detailing the history of integration in the copper industry, the court found that Kennecott and the next two largest copper producers, Phelps Dodge and Anaconda, accounted for about 60 percent of the refined copper shipments, and that about 65 percent of these three companies' shipments was consumed by their own fabricating facilities (J.S. 24a). Kennecott's acquisition of Okonite was not only caused by these forces, but also served to accelerate them.

The danger of allowing the trend of integration to continue was, the court found, real and obvious—independent fabricators would be driven out of business because of the cost advantages enjoyed by their suppliers, who also were competitors. The result would be not only the elimination of a number of comparatively small independent fabricating businessmen but also a crucial loss of markets to non-integrated producers of copper (J.S. 22a):

> The integrated companies obtain the copper raw material at their cost of production, while the nonintegrated companies must pay the market price and then process the wirebar [refined copper] into wire and cable and sell it at a competing price with the integrated company.

> The integrated companies thus have an opportunity for profit in the production of the metal to justify their staying in a market where there is a squeeze on fabrication, whereas the non-integrated companies have no alternative opportunity for profit.[12]

The end result of the elimination of independent fabricators would be to deprive smaller non-integrated producers of copper of a market for their products. The court found (J.S. 21a):

> The problem is that a few big copper producers may buy up the available independent fabricators. Fabrication would then cease being a small business field and would be dominated by a few giant corporations which produce their own copper. The remaining independent fabricators would fail because they could not compete against fabricators with assured sources of supply and large amounts of capital. The small copper producers would then have no place to market their product and would fail, increasing the concentration among producers as well. * * *

[12] The court noted (J.S. 22a) that this very process was already going on. The price of insulated wire and cable had been falling since 1958 while the price of refined copper remained stable, resulting in reduction of profit margin or the sustaining of losses by manufacturers of insulated wire and cable. The stability of copper prices demonstrates that the disadvantage to non-integrated cable producers is not likely to be relieved by availability of imports of refined copper, as appellant suggests (J.S. 16–17). In any event, there is a duty on copper imports, and the price of foreign copper has often exceeded the price of the domestic product (GX 6, p. 27; GX 347). There is no indication that foreign copper delivered in this country would be cheaper.

It was upon this realistic appraisal of the industry that the court declared that "any significant increase" in integration "among the big three by merger is highly suspect" (J.S. 24a). In view of the actual foreclosure of Okonite as a customer for refined copper and the probability that a continuation of the trend of integration would result in the elimination of other independents and of the market they furnish for the refined copper of small non-integrated producers, the district court correctly concluded that the result of the Kennecott-Okonite merger was likely to be a substantial lessening of competition in the manufacture and sale of refined copper.

III. THE DISTRICT COURT CORRECTLY ENJOINED FOR FIVE YEARS FURTHER ACQUISITIONS IN THE MARKETS ADVERSELY AFFECTED BY THE PURCHASE OF OKONITE

The decree requires Kennecott to divest its interest in Okonite, and also prohibits Kennecott for a period of five years from acquiring any other company "engaged in the production, fabrication or sale of refined copper or insulated wire and cable or paper insulated power cable * * *" (J.S. 27–28a). Appellant does not contest the appropriateness of divestiture. It urges, however, that the injunction against future acquisitions was improper, and that, in any event, the injunctive provisions are too broad.

Contrary to appellant's assertion (J.S. 24), there was abundant evidence in this case demonstrating the need for such an injunction. The record established, and the district court found, that the copper industry is marked by a substantial trend to integration

through the fabrication stage by the three largest producers. Appellant, the largest producer, not only had participated in that trend by its acquisition of Okonite but specifically announced that that merger was "only the first step" in a major expansion program in the electrical transmission field (Tr. 1531).[13] In these circumstances, where appellant intended to add further to the "alarming degree" (J.S. 23a) of integration already existing in the industry and where, in fact, a part of its expansion (the acquisition of Okonite) violated Section 7 of the Clayton Act, a provision enjoining future acquisitions of wire and cable fabricating companies for a limited period was a necessary item of relief. See *United States* v. *National Lead Co.*, 332 U.S. 319, 338.

The prohibition of acquisitions by Kennecott of companies producing refined copper was also well within the trial court's discretion. While Okonite was not a copper producer itself, the vertical impact of the acquisition on competition among such producers violated Section 7. The acquisition, like other forms of forward integration, was motivated by a desire to avoid the pressure of competition among copper producers (*supra*, pp. 20, 21–22); other attempts to reach the same end could be anticipated. Thus, the court held that the probable result of the

[13] As already indicated (p. 20, *supra*), Kennecott felt it had to expand its fabricating operations to assure a market for its copper production. It planned an expansion of Okonite to consume as much as 54,000 tons of refined copper, or approximately 5 percent of total domestic consumption (GX 1, pp. 1, 6; see also GX 52, p. 2).

process of which the Okonite acquisition was a part would be the elimination of small copper producers, thereby "increasing the concentration among producers * * *" (J.S. 21a). In the context of an extremely concentrated market for refined copper, an injunction designed to prevent further increases in this concentration for a period of five years was reasonable and proper.

Nor is there merit in appellant's contention (J.S. 24) that the judgment improperly forbids acquisitions outside the United States. As Chief Judge Ryan stated (Transcript, November 12, 1964, p. 30):

> * * * [U]nless I make [the judgment] as broad as this, there would be nothing barring Kennecott from setting up a foreign subsidiary to make paper insulated copper cable abroad and then bringing it back to the United States and marketing it here. That would be a direct attempt at accomplishing what the Court would find to be wrong here at this stage.

Moreover, Judge Ryan pointed out that if the exigencies of foreign competition during the relatively short life of the injunction require Kennecott to take steps that might appear to violate the decree, "the law is quite plain that you can always come in and ask for modification * * *" (*ibid.*). See *United States* v. *National Lead Co.*, 332 U.S. at 363; *International Salt Co.* v. *United States*, 332 U.S. 392, 401; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431.

We submit that the injunctive provisions in this case are reasonably directed at the primary purpose of restoring competition in the markets involved and

that no abuse of the trial court's discretion has been shown.

CONCLUSION

The decision below is correct. Because the case is controlled by precedent the appeal presents no question warranting plenary consideration. The judgment of the district court should be affirmed.

Respectfully submitted.

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APRIL 1965.

U.S. GOVERNMENT PRINTING OFFICE (1965)

ILE COPY

Office-Supreme Court, U.S.
FILED
MAY 19 1965
JOHN F. DAVIS, CLERK

No. 995

IN THE

Supreme Court of the United States

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KENNECOTT COPPER CORPORATION,
Appellant,

—v.—

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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INDEX

	PAGE
STATEMENT	1
1. The Companies Involved	4
2. The Acquisition	6
3. The Effect of the Merger Upon Competition	7
ARGUMENT:	
1. Paper Insulated Power Cables	9
2. Refined Copper	15
3. The District Court's Injunction	22
CONCLUSION:	
The Motion To Affirm Should Be Denied	22

TABLE OF AUTHORITIES

Cases

Brown Shoe Co. v. United States, 370 U.S. 294 ..... 9, 15, 16, 19

Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 17

United States v. Aluminum Company of America, 377 U.S. 271 ..... 9, 10, 14, 15

United States v. W. T. Grant Co., 345 U.S. 629 ... 22

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Appellants submit this brief, pursuant to Rule 16, Paragraph 3 of the Rules of this Court, in opposition to plaintiff-appellee's Motion to Affirm.

STATEMENT

The facts set forth in appellant's Jurisdictional Statement are not challenged in the Motion to Affirm.

Nor is there any challenge to appellant's analysis showing that the district court decided this case by the application of a theory of *per se* illegality of vertical acquisitions, and of *per se* illegality of horizontal combinations involving 20% of a theoretical submarket, irrespective of how small a fragment of a true industry market is involved.

Rather, as we demonstrate below, the Motion to Affirm attempts to support the decision below by relying on as-

sertions of fact which are contrary to the evidence, and by ascribing to the district court factual and legal bases for decision which nowhere appear in the findings or opinion.

The government does not dispute the following facts stated in the Jurisdictional Statement with respect to the alleged paper insulated power cable "submarket":

a. At the time of the acquisition, Okonite's physical facilities were fast becoming obsolete (J.S. 5, 11-12*). It was losing out in the competitive race to lower cost, mass-produced items (J.S. 5, 11). Its venture into the mass-production market was unsuccessful (J.S. 13).

b. Okonite was unable to make 345 kv paper insulated power cable, which was soon to represent a very major type of cable. Nor could it satisfactorily manufacture certain large diameters of lower voltage paper insulated power cables (J.S. 12). Okonite needed large sums of money to re-equip its paper insulated power cable production facilities in order to survive (*ibid.*).

c. After the acquisition, Okonite incurred substantial operating losses (J.S. 6). It incurred them because of its inability to make the transition from a wartime and post-war economy to a peacetime economy, where its competitors were installing more modern equipment and making more modern, lower cost products (J.S. 5).

d. Before the acquisition of Okonite, the wire and cable subsidiary of Kennecott, KWC, had a small, old plant

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* As used herein, references and citations to "Tr." are to the transcript of trial, "GX" to the government's exhibits, "DX" to appellant's exhibits, "J.S." to the Jurisdictional Statement, and "M.A." to the government's Motion to Affirm.

which was badly located in Rhode Island (J.S. 6). Its principal products were telephone cable and magnet wire, neither of which was made by Okonite (J.S. 13).

e. KWC made and could make a small amount of only one of the four types of cables included in the alleged "submarket" of paper insulated power cables, *i.e.*, solid type in voltages from 1 kv to 27 kv (J.S. 7-8). At these voltages paper competes with other insulations, namely rubber and plastic (polyethylene) (J.S. 8-9). The majority of Okonite's sales of paper insulated power cables were of types other than the solid type made by KWC (J.S. 9).

f. The district court's finding of a violation of Section 7 in the paper insulated power cable "submarket" was based on just three facts:

(1) The combined market shares of the four largest companies (which did not include KWC) were about 90%;

(2) Okonite had 19.6% and KWC 2.1% of this so-called "submarket"; and

(3) The number of sellers was reduced by one (J.S. 10-11).

Nor does the government dispute, with respect to the refined copper line of commerce, the following facts stated in the Jurisdictional Statement:

a. Copper is an international commodity freely traded in a world market (J.S. 16). The amount of copper produced, both domestically and throughout the world, is constantly increasing due to the beginning of operations of new companies and the opening of new mines (*ibid.*).

b. Kennecott's share of domestic shipments of refined copper declined from 33% in 1954 to 20% in 1962 (*ibid.*).

c. Prior to the acquisition Okonite had bought its copper largely from foreign sources (*ibid.*), and its copper purchases represented only about 0.3% of 1958 free world supply and less than 1% of domestic shipments of refined copper (*ibid.*).

d. The extent of integration of major copper producers into copper fabrication has been declining, and has continued to decline since the Okonite acquisition (J.S. 20-21).

e. The facts contradict the district court's assumption that the Okonite acquisition may be followed by further acquisitions of wire and cable fabricators by major copper producers (J.S. 19).

1. The Companies Involved

Kennecott

In describing Kennecott's position in the wire and cable industry, the Motion to Affirm states that its subsidiary, KWC, "accounted for less than 2 percent of wire and cable sales . . ." (M.A. 3).

On the contrary, the government at trial conceded the correct statistics: KWC's total sales of wire and cable in 1958 were $13 million (DX 104), or less than 0.8% of total industry sales of $1,681 million (DX 87, p. 20, line 27).

The Motion to Affirm would also give the impression that KWC "was a viable, active competitor" in paper insulated power cables (M.A. 15), "expert in the technology, [and] familiar with the customers . . ." (M.A. 17).

On the contrary, plaintiff's own evidence is that KWC could make only a small amount of one of the four types of paper insulated power cables, *i.e.*, solid type in voltages from 1 kv to 27 kv (Tr. 395-397, 664), and did "not have adequate management, research, sales or production 'know how' " in the power cable field (GX 1, pp. 3-4).

In its brief to the district court after trial (p. 21), the government specifically argued that "KWC . . . lacked important technical and management 'know how' ", citing the same exhibit.

Okonite

The government would portray Okonite as a successful company at the time of the acquisition. The evidence was to the contrary. The lack of profits in 1958 (DX 11), and the subsequent losses of approximately $5,000,000 (DX 12-15, 100), fairly illuminate its financial condition at the time of acquisition. The fact that it had "an excellent name" (M.A. 4) is not responsive to the Jurisdictional Statement's showing that Okonite had obsolete physical facilities which were in large part the cause of its history of operating losses (J.S. 11-12).

Referring to Okonite as "the second largest independent company in the insulated wire and cable field" (M.A. 3-4) is wholly argumentative. It was stipulated to be the eighth largest producer of insulated wire and cable, with only 2.7% of domestic shipments (DX 94). This fact, plus Okonite's financial difficulties and obsolete plants and the insignificance of KWC, are part of the background of the district court's refusal to find that the acquisition had any effect whatever on competition in the stipulated line of commerce of insulated wire and cable.

As the question of competition in the insulated wire and cable market is no longer in issue, the semantics of "independent company" have become irrelevant. The size of Okonite is important only in the context of its being a purchaser of refined copper. Okonite was the eighth largest producer of insulated wire and cable, and as such it was a very, very much smaller purchaser of copper than the leading companies in the wire and cable industry (GX 470A), and very much smaller than the leading companies in other industries to which copper is sold as well.

With respect to the alleged "paper insulated power cable" submarket, the fact that Okonite's three principal competitors were subsidiaries of or closely affiliated with major copper producers has a significance which the government overlooks. The other three—Anaconda, Phelps Dodge and General Cable—were very successful, well financed companies with which Okonite would have to compete at a severe handicap because of Okonite's inferior physical equipment (Tr. 1116-1117, 2323-2325) and the lack of funds to establish competitive production facilities (Tr. 1204).

2. The Acquisition

The government seems to be saying (M.A. 6) that it was appropriate for Anaconda in 1922 to acquire a brass-fabricating subsidiary "to promote the sale and distribution of copper and brass products", and the government does not quarrel with Anaconda's 1929 acquisition of wire and cable fabricators or the 1930 acquisition of copper fabricators by Phelps Dodge. It complains only of Kennecott's very much smaller acquisition of Okonite. Yet, by this suit, the government would attempt to foreclose Ken-

necott from "promoting the sale and distribution of copper" by selling wire and cable, and competing with aluminum as the conductor metal for electrical wire and cable, even though the district court could find no adverse effect on competition in the wire and cable industry.

The Motion to Affirm is in error in stating that Kennecott chose external acquisition rather than internal expansion in order to "eliminate . . . competitive pressures" (M.A. 7). This is a comment of a third party which the government puts in the mouth of Kennecott (see Tr. 1164).

3. The Effect of the Merger Upon Competition

Despite the heading, this section of the Motion to Affirm does not discuss competition. The district court, applying rules of *per se* illegality, never discussed competition. The evidence, however, is that the acquisition did not threaten to lessen competition in any way.

Understandably unhappy with the findings and opinion below, the government ascribes to the district court new bases of decision. But the district court did not find that KWC was "a substantial fabricator of paper-insulated wire and cable" (compare M.A. 9 with J.S. 15a-17a) and it did not consider Kennecott's position as a copper producer as a factor in its decision with respect to the so-called paper insulated power cable "submarket" (compare M.A. 8-9 with J.S. 15a-17a).

The district court based its decision on the horizontal aspect of the case on only three facts: (1) Okonite was the third largest producer of paper insulated power cables with 19.6% of industry sales and KWC was eighth largest with 2.1%; (2) the four largest companies had roughly

90% of total sales; and (3) the number of sellers was reduced by one.

The Motion to Affirm states that KWC's market share "ranged from 2.1 percent to 3.4 percent" (M.A. 8) in the years preceding the merger; rather, according to the evidence, it ranged downward from 3.4% to 2.1% (GX 405). That the four leading companies increased their aggregate percentages between 1954 and 1962 was largely the result of a 4.4% increase in Anaconda's share of sales, rather than the result of combining the sales of Okonite and KWC (*ibid.*).

In discussing the refined copper line of commerce, the Motion to Affirm similarly finds it necessary to exaggerate the district court's opinion.

The district court did not find that "the merger had a not-insignificant effect on the refined copper line of commerce", or that it had any effect. The district court did not base its decision on any finding of actual foreclosure of a market to "small independent copper producers". It did not find that "independent fabricators were threatened with extinction through the competition of their own suppliers". On the contrary, the district court specifically rejected the government's contention that Kennecott favored its own fabricating subsidiaries over its independent fabricator customers. The independent customers represent 90% of Kennecott's copper sales to the wire and cable industry (GX 430, 471, Table 6), and the district court expressly found that "[I]f Kennecott were to discriminate against its [independent] wire and cable customers it would severely damage its own business" (J.S. 23a).

The Motion to Affirm asserts that Anaconda and Phelps Dodge, on the other hand, shipped most of their copper production to fabricating subsidiaries (M.A. 21), and the government seems to argue that the high degree of integration of Anaconda and Phelps Dodge should be remedied by requiring Kennecott to divest not only Okonite but also KWC, which Kennecott owned before the Okonite acquisition, so that Kennecott would be stripped of all wire and cable operations.

ARGUMENT

1. Paper Insulated Power Cables

The government argues that *United States* v. *Aluminum Company of America*, 377 U.S. 271, establishes a rule of *per se* illegality where, "in highly concentrated markets, dominated by a few companies but served also by a small, though diminishing, group of independents', the acquisition of one of the few significant remaining independents by one of the leading integrated companies violates Section 7" (M.A. 12-13).

This court has consistently held that mergers are not illegal *per se*, and that each must be viewed in the context of the particular industry involved. See, *e.g.*, *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 321-22. Moreover, even the "rule" which appellee would read into *Alcoa* does not fit this case.

1. The district court did not find that KWC was "one of the leading integrated companies" in paper insulated power cables; in fact, it was the smallest and most negli-

gible producer of that product (GX 405, 471, Table 2), and certainly did not share in "dominating" the market. Moreover, the market involved in *Alcoa* was the very much larger market for aluminum wire and cable; here we are considering but a small fragment of a market: although sales of paper insulated power cables reached an abnormal high of $64 million in 1956, they were normally close to the $39 million of 1958 (GX 471, Table 2), or only 2.4% of total wire and cable industry sales of over $1,681 million in that year (DX 87, p. 20, line 27).*

The market is not unduly concentrated; the government's own expert testified that there is not enough business in very high voltage cables to support even the existing number of competitors (Tr. 2662). Okonite was not "eliminated" as a competitor. Rather, it was strengthened by Kennecott's money so that it could compete with General Cable, Anaconda and Phelps Dodge (Tr. 1116-1117, 2323-2325).

The evidence fully supports the conclusion that Okonite had exhausted its borrowing capacity (Tr. 1204), and that Okonite's future was "cloudy" at best (Tr. 1233), and the government itself argued to the district court (Brief After Trial, p. 21) that Okonite was handicapped by lack of financial resources.

The government argued below both (1) that overcapacity in the wire and cable industry was resulting in low profit margins, which in turn threatened the continued viability of independent fabricators, and (2) that combining Okonite and KWC eliminated potential expansion

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* KWC's sales represented 2.1% of that 2.4%, or 0.05% (GX 405).

by each of them. However, the government realized that its arguments were mutually self-defeating because, on its theory, if Okonite were to modernize and expand its facilities so that it could become competitive, and KWC were to build the new facilities it would need in order even to attempt to compete, there would be more overcapacity in the industry and, on the government's hypothesis, an even greater threat to the continued existence of the independent fabricators, including Okonite.

In this dilemma, the government argued that there was no fear of such an eventuality because Okonite really did not have the necessary financial resources, and KWC really did not have the necessary technical or management abilities (Brief After Trial, p. 21).

2. The Motion to Affirm, in attempting to justify the district court's finding that paper insulated power cables have the "practical indicia" of a separate submarket, proves instead the economic fallacy of combining the "solid type" paper insulated power cables manufactured by KWC, and "other types" of such cables which it did not manufacture, in the same submarket.*

a. KWC made only solid type paper insulated power cables (Tr. 395-397, 664). Okonite made solid type and the three other types as well (Tr. 397). Specialized machinery and special technical knowledge are necessary for the three other types (*ibid.*), and KWC had neither the requisite machinery nor

* The other three types of paper insulated power cables are (i) oil filled, (ii) gas filled and (iii) pipe types. For a more complete description see pages 7-8 of the Jurisdictional Statement.

the technical knowledge (GX 1, pp. 3-4; Tr. 395-396, 1163-1164).

b. Separate specifications are published for the solid type, and different specifications are published for the other types (Tr. 229-230).

c. The price trend for solid type does not necessarily follow the price trends for other types (Tr. 413-414). Foreign competition is significant in the solid type, but not in the other types (*ibid.*).

d. The industry recognizes the division of paper insulated power cables into solid type and other types, and treats the solid type as a separate product (GX 169).

e. Eight companies were engaged in producing the solid type, whereas a distinct group of four of them (not including KWC) produced the other types (Tr. 152).

The district court found that "in the main, paper insulated power cable has no effective competition in the area of its major use from other types of insulated power cable" (J.S. 10a-11a). This is true only if the limiting expression—"in the main"—is intended to restrict the finding to the "other types", which KWC did not make but which represented the majority of Okonite's sales. The government's expert witnesses testified that the solid type has effective competition from rubber and plastic insulated power cables (Tr. 405-413, 1212-1213, 1945-1946).*

* The government's technical expert testified that plastic insulated power cable will soon be standard construction where solid type paper insulated power cables have been used (Tr. 412).

The government's final argument is the supposed "administrative difficulty (if not impossibility) of inventing, defining, and measuring novel subcategories" (M.A. 17), but there is no such difficulty; the solid type subcategory is well established and statistics for it are collected by the industry's trade association (GX 169).

The selection of a submarket can be supported only if it has economic reality, and then only to the extent that it is the area in which the two merging companies compete.

The decision below cannot be supported on either of these tests. There is no economic reality in (i) including in a small submarket different products which require different equipment and expertness, such as solid type paper insulated power cables on the one hand, and on the other hand the other types of paper insulated power cables which are used in different applications and which carry electricity at higher voltages, and (ii) putting in separate submarkets the other insulated power cables which compete with the solid type paper insulated power cables for the transmission of electricity in the voltage range of the solid type cables, *i.e.*, rubber and plastic insulated power cables.

3. The evidence is that Okonite and KWC did not compete in "paper insulated power cable".* The government has never contended that KWC competed in the "other

* The Motion to Affirm states that "Kennecott itself recognized that the product duplication between it and Okonite lay in the field of paper-insulated power cable (see GX 1, p. 7)" (M.A. 16 n.9); reference to the cited source will show that the government has excised the important words which complete the statement: "for lower voltages". This truncated quotation appears not only in the footnote on page 16 of the Motion to Affirm but also in the footnote on page 18.

types", which it admits represented 55 percent of Okonite's 1958 sales of paper insulated power cables.*

The government understandably argues a theory of *per se* illegality, despite the differences between this case and *Alcoa,* since all of the economic evidence tends to disprove any adverse effect on competition. We mention just a few of these facts.

a. The insubstantiality of KWC's competition is evidenced by the fact that the total gross cost of KWC's facilities used to make solid type paper insulated power cables was less than $325,000 (Tr. 2039-2049)**; in comparison, it cost $8 million (borrowed from Kennecott) just to re-equip the Okonite facilities to make paper insulated power cables so that it could be competitive with General Cable, Anaconda and Phelps Dodge (Tr. 1116-1117, 1220-1223, 2050, 2323-2325).

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* Four of the eight producers of paper insulated power cables (U.S. Steel, Colorado Fuel & Iron, Simplex and KWC) made only solid type cables (Tr. 152, 387-388). There is no sales breakdown in the record between solid type and other types for General Cable, Anaconda, or Phelps Dodge, which, like Okonite, made all types. However, Okonite's share of sales of solid type paper insulated power cables was necessarily less than its 19.6% share of all types of paper insulated power cables.

Moreover, there are substantial imports of the solid type cables, which would reduce the percentage shares of all domestic producers. Imports of solid type cables on the West Coast alone were about twice KWC's $800,000 of sales of that product nationally in 1958 (Tr. 361). Thus, in making a comparison with Alcoa's 27.8% of aluminum wire and cable, the correct figure is not Okonite's 19.6% of domestic producers' sales of all types of paper insulated power cables, but its substantially lower percentage of solid type cable sales.

** Production at KWC's inadequate, obsolete and badly located facilities has been discontinued (Tr. 635-636).

b. The government's expert testified that, before making this expenditure, Okonite did not have the facilities to compete with General Cable, Anaconda or Phelps Dodge in the manufacture of very high voltage paper insulated power cables (Tr. 397), and that Okonite's facilities did not permit it to make an acceptable product at lower voltages at which Okonite had taken orders (Tr. 400-402).

c. The government witnesses who were purchasers of power cable testified that the elimination of KWC as a producer of such cables would not affect them in any way (*e.g.*, Tr. 414).

d. It is extremely doubtful that Okonite would be a viable competitor today except for the financing made available by Kennecott; Okonite could not match the financial resources of General Cable, Anaconda and Phelps Dodge (DX 10-11) and was in imminent danger of falling out of competition altogether.

This Court's decision in *Alcoa* did not lay down a rule of *per se* illegality regardless of economic realities, yet the decision in the district court necessarily assumes such a *per se* rule, as does the government's argument here.

2. Refined Copper

The government's argument is this: "Under *Brown Shoe Co. v. United States*, 370 U.S. 294, Section 7 of the Clayton Act prohibits Kennecott's acquisition of a major customer for refined copper (Okonite) as a part of a significant trend toward vertical integration by copper producers" (M.A. 18-19). Again, there is no reference to competition.

This Court took great pains in *Brown Shoe* to point out that it applies no rule of *per se* illegality. That decision was based on an analysis of the facts in that case, which were far different from those here.

1. In *Brown Shoe* there was substantial evidence of injury to retail stores competing for business with the Kinney retail stores. 370 U.S. at 344. There was no such evidence in this case. In *Brown Shoe* there was evidence that Kinney represented a substantial market for certain small independent shoe manufacturers. *Id.* at 303, 332, 345. There is no comparable evidence here.

In the period 1954-1958, Okonite's largest suppliers of refined copper were Kennecott, Phelps Dodge and American Metal Co. Ltd. (GX 235). Over half of the copper supplied by American Metal came from foreign sources (*ibid.*). In 1958, 82.0% of Okonite's copper purchases were made pursuant to term contracts with American Metal and British Metal Corp. of Canada. These companies supplied about 67.0% of Okonite's requirements in 1957 (GX 235; DX 16).

The government could find no copper producer who thought that he could be injured by Kennecott's acquisition of Okonite. Independent domestic producers supplied an average of only about 1,600 tons per year of the copper purchased by Okonite during the years 1954-1958 (GX 235). Total domestic consumption averaged about 1,375,000 tons per year during that period (GX 419).

Okonite was not a substantial customer for copper. Considering the extent of Okonite's foreign purchases, and the fact that Okonite could and did look to the world market for its supply, the relative importance of Okonite as a cus-

tomer is measured by its purchases of 0.3% of free world copper production (DX 16, 85). Even from the viewpoint of the domestic copper market, Okonite represented less than 1% of the demand side of the market (GX 471, Table 5; DX 16) and annual increases in domestic production have been five times as great as Okonite's total purchases of copper from both domestic and foreign sources (GX 419; DX 16).

It is in that context that we must view the fact that by applying 1963 copper prices to Okonite's 1958 tonnage purchases of copper from both domestic and foreign sources, the Motion to Affirm achieves a dollar volume of over $6 million (M.A. 19-20). But compare *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 333-34, where this Court characterized a pre-emption of less than 1% of the market as "conservatively speaking, quite insubstantial," and stated: "It is urged that the present contract pre-empts competition to the extent of purchases worth perhaps $128,000,000, and that this 'is, of course, not insignificant or insubstantial.' While $128,000,000 is a considerable sum of money, even in these days, the dollar volume, by itself, is not the test, as we have pointed out."

The Motion to Affirm repeats again and again the irrelevant (and inaccurate) statement that Okonite was the largest or the second largest independent producer of insulated wire and cable. The district court having found no adverse effect of the acquisition on the insulated wire and cable market, analysis of that market has become irrelevant. Looked at from the point of view of the market for refined copper, it makes no difference whether very large wire and cable fabricators such as Western Electric, Gen-

eral Electric or General Motors, for example, are "independent", or what kinds of insulated wire and cable Essex produced; these considerations do not affect the fact that they purchase many times as much copper as Okonite for fabrication into insulated wire and cable, they are not controlled by any copper producer, and are not "foreclosed" as customers of non-integrated copper producers.

2. The government's main argument is that there has been a trend toward integration of copper producers and copper fabricators, but no attempt is made to prove this supposed trend. Proof is not afforded by the fact that in 1958 Anaconda shipped 93.7% of its copper to its own fabricating facilities, Phelps Dodge shipped 76.8%, and Inspiration (of which Anaconda is a substantial stockholder) sent 40% of its shipments to subsidiaries of Anaconda.* The figure for Kennecott was 25.2% (GX 430).

These are static figures for the year 1958, and the government bases its argument on a supposed trend toward further integration. It makes no attempt, however, to demonstrate such a trend, which is in fact non-existent. The refined copper shipped by Anaconda, Phelps Dodge and Kennecott and consumed by their fabricating subsidiaries or divisions, including both wire mills and brass mills, represented a markedly declining percentage of total domestic shipments of refined copper before the acquisition of Okonite in 1958, and the declining trend continued after that acquisition. The percentages for these three separate companies, in the aggregate, were 28% in 1955, 22% in

* A footnote in the Court's opinion points out that a majority of the shipments by Phelps Dodge were destined for reshipment to independent fabricators, and this was true to a lesser extent of Anaconda (see J.S. 24a fn.).

1958 and 20% in 1961, even though Kennecott's shipments to Okonite are included for 1961 and not for the earlier years (GX 430, 457, 458, 471, Table 6). These figures were set forth in the Jurisdictional Statement (J.S. 20-21) and are not disputed.*

The evidence destroys the government's premise of a trend toward greater vertical integration**; the evidence discloses the opposite of the trend found in *Brown Shoe*.

3. The government assumes, as did the district court, that the independent wire and cable fabricator cannot survive in competition with the integrated companies, principally Anaconda, Phelps Dodge and General Cable. But this premise is contrary to the evidence. The evidence showed that most wire and cable companies are operating profitably despite industry overcapacity (DX 41), and

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* Nor is there any dispute that Kennecott's share of domestic copper shipments declined from 33% in 1954 to 20% in 1962 (J.S. 16).

** Contrary to the figures in the Motion to Affirm on the extent of integration of Anaconda, Phelps Dodge and Kennecott, the government's own exhibits show the constant decline in the aggregate of the percentages of those companies' copper shipments consumed by their fabricating subsidiaries, including both brass mills and wire mills:

Year	Percentage of Refined Copper Produced by Anaconda, Phelps Dodge and Kennecott and Consumed by Their Own Fabricating Subsidiaries
1955	46.0
1956	45.6
1957	46.3
1958	42.7
1959	43.8
1960	40.8
1961	39.0

Source: GX 430, 457, 458.

that price reductions were usually initiated by the independent companies (Tr. 1628-1629).*

The very real danger that Okonite would not have survived as an independent company resulted from circumstances peculiar to it, which are briefly summarized at pages 11-13 of the Jurisdictional Statement. Okonite had failed to keep its production facilities modern and efficient, and sales were declining because some of its major products were becoming obsolete as competitors developed cheaper and better substitutes. In a belated attempt to enter the low-cost, mass-production market, Okonite spent all the money it had or could borrow, but found itself unable to operate the new facilities profitably. In order to survive, Okonite had not only to expand but also to spend millions of dollars, which it did not have, for new equipment to make its existing products satisfactorily. Thus, the threat to Okonite's survival was the result of a combination of its old and inefficient production facilities, its declining sales of obsolescent products, and the exhaustion of its financial resources.

4. Nor did the district court find—as the government now argues (M.A. 21)—that integration resulted in cost advantages; on the contrary, it found that "there is neither any claim nor any evidence that integration between copper production and fabrication results in cost savings" (compare M.A. 21 with J.S. 23a). The district court's argument was that, if there were no profit in fabrication,

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* Kennecott's executive vice-president did not testify, as the government asserts, that integration resulted in a "squeeze" on independent fabricators (compare M.A. 20 with GX 1, pp. 1-2, and Tr. 2283-2284).

the integrated companies would nevertheless have an alternative opportunity to profit on the metal.

This argument has several defects. First, no company would make substantial investments in two businesses, both of which are highly competitive, and plan to let the profits from one of them be eaten up by losses in the other. Second, wire and cable fabricators like Western Electric, General Electric, General Motors, Westinghouse and U. S. Steel also have alternative opportunities for profit which would justify their waiting out any hypothetical period of losses in wire and cable fabrication. But the basic defect in this line of argument is that the competent wire and cable fabricators operate profitably (DX 41) and there is no "squeeze".

5. Moreover, the government's argumentation is essentially irrelevant to the issue to be decided, which is whether the Okonite acquisition may substantially lessen competition in *refined copper*. It is pointless for it to argue about whether there might be a lessening of competition in the wire and cable industry, because the district court found no danger that the Okonite acquisition might lessen competition in that industry.

In the Jurisdictional Statement, appellant pointed out that, in the district court's analysis of the effect of the Okonite acquisition in the refined copper industry, the essential finding was that the independent copper producers would have no place to sell their copper. The error of this finding was pointed out in the Jurisdictional Statement.

The Motion to Affirm does not attempt to support this indispensable finding of the district court.

The government has thus abandoned the district court's rationale for decision. Under the circumstances, it can hardly claim that the district court was so clearly correct that this Court should not review the decision.

3. The District Court's Injunction

The Motion to Affirm does not deny that a substantial question is presented by the fact that the district court's decree enjoins lawful conduct. The government does not even address this important question.

The district court found no likelihood that Kennecott would make any unlawful acquisitions in the future, and did not base its injunction on any such threatened conduct. An injunction was therefore not warranted. See *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633.

CONCLUSION

The Motion To Affirm Should Be Denied

The Motion to Affirm does not meet the issues raised by the Jurisdictional Statement, and generally ignores the facts of record there cited as disproving the district court's findings and conclusions.

The government has failed to demonstrate a parallel between this case and *Alcoa* or *Brown Shoe*, and abandons the untenable basic premise of the district court that the effect of the Okonite acquisition may be the disappearance of all independent wire and cable fabricators, with the result that independent copper producers would have no place to sell their copper.

The Motion to Affirm never discusses competition, but seems to ask this Court to join in reading out of the statute the concept that it is addressed to competition.

The judgment below with respect to the so-called paper insulated power cable line of commerce can be sustained only by (i) accepting an artificial submarket which defies the economic realities here involved by including all disparate kinds of paper insulated power cables and excluding other types of power cable which compete directly with solid type paper insulated power cables, and then by (ii) reading the *Alcoa* case as making illegal *per se* any horizontal combination involving much smaller market shares, much weaker competitors, and entirely different markets than were involved in that case.

The district court's decree cannot be sustained even if its incorrect decision on paper insulated power cables as a "submarket" is affirmed. This would affect only a small portion of the businesses of Okonite and KWC and would not justify the broad relief granted.

An affirmance of the decision on the refined copper line of commerce would require a holding that the acquisition of a customer is illegal *per se,* because all other bases for the decision below are either factually or logically untenable.

There are also the novel questions whether a decree in a Section 7 case should be so broad as to enjoin lawful conduct, without any finding to justify such a broad decree, where the consequence may be to injure rather than promote competition and the economy of the industry, and whether an injunction is warranted when there is no likelihood of recurring violations.

The Motion to Affirm should be denied.

Respectfully submitted,

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May 1965

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